Supreme Court, U.S.
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No. 10- 10-180

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

MARLITA THOMAS, as mother, next friend and Special Administrator of the Estate of Norman L. Smith, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the per se rule effectively adopted by the court below, that the issuance of a "no duplication of damages" instruction to the jury in a Section 1983 claim cures any error that may result from incorrect adjoining instructions that invited the jury to assess damages "by defendant" and "by claim" and to decide the legal question of joint liability, is proper.

2. Whether the adjudication of constitutional tort claims against multiple defendants for a single, indivisible injury violated either the law of damages in Section 1983 actions or the defendant's Seventh Amendment right to a fair trial, where the district court invited the jury to assess damages "by defendant" and "by claim," the jury did so and the district court then aggregated the separate damage awards into a single judgment.

LIST OF PARTIES

The parties to the proceeding below were defendant/petitioner County of Cook, a body politic and corporate, defendants Cook County Sheriff's Department, Alex Sanchez, Jesus Facundo, Terrence Toomey are being served as respondents and plaintiff/respondent Marlita Thomas as mother, next friend and Special Administrator of the Estate of Norman L. Smith, deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner County of Cook, Illinois (the "County") respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit filed on May 3, 2010.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed the jury verdict and judgment entered in the United States District Court for the Northern District of Illinois. The Seventh Circuit's amended opinion is reported at 604 F.3d 293 (7th Cir. 2010) and is reprinted in the Appendix hereto at App. 1a. The Seventh Circuit's initial opinion is reported at 588 F.3d 445 (7th Cir. 2009) and is reprinted in the Appendix hereto at App. 56a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioner seeks review was issued on May 3, 2010. (App. 1a) This petition was timely filed within 90 days of the issuance of the May 3, 2010 opinion, which amended the Seventh Circuit's December 1, 2009 opinion in this matter and which denied the County's petition for rehearing en banc.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment

> Trial by jury in civil cases.
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. Section 1983

> §1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Norman Smith died from meningitis while incarcerated at the Cook County Sheriff's Department of Corrections. Smith's mother, Marlita Thomas ("Plaintiff"), filed multiple state law and constitutional tort claims against the Cook County Sheriff, various deputy sheriffs and the County (collectively "Defendants"). Plaintiff alleged that Defendants were deliberately indifferent in failing to provide medical assistance resulting in Smith's death, a single, indivisible injury. The case proceeded to trial before a jury.

A two week jury trial culminated with a verdict in favor of Thomas. The jury awarded Thomas $3,000,000.00 against the County and $1,000,000.00 against the Sheriff. The jury found three of the deputy sheriffs liable and awarded compensatory damages of $150,000.00 collectively against these individuals. The district court entered judgment against all defendants in the amount of $4,150,000. *See Thomas*, 604 F.3d at 310-311;[1] *see also Thomas*, 604 F.3d at 314 (Sykes, J., dissenting in part from the denial of rehearing

[1] Ironically, the panel decision affirmed the aggregated judgment that included the $1,000,000 that the jury assessed against the Sheriff even though the panel also held that it did not "find sufficient evidence, however, to hold the Sheriff liable." *See Thomas*, 604 F.3d at 298.

en banc) (observing that "[t]he district court added the jury's improper separate awards (the total: $4.45 million), ordered a modest remittitur, and entered judgment for $ 4.15 million"). Defendants appealed this judgment and the Seventh Circuit affirmed. *See Thomas v. Cook County Sheriff's Dep't*, 588 F.3d 445 (7th Cir. 2009).

The County then filed a petition for rehearing *en banc* on the grounds that the panel decision could not be reconciled with earlier decisions from the Seventh Circuit[2] that rejected the notion that damages could be apportioned among joint tortfeasors and suggested that, at most, "the highest assessment of compensatory damages against any of the jointly liable defendants placed a ceiling on the recovery of compensatory damages." *See Bosco*, 836 F.2d at 281.

On May 3, 2010, by a 7-3 vote, the Seventh Circuit denied the County's petition and issued an amended panel opinion. Judge Sykes, joined by Judges Posner and Tinder, dissented in part from the denial of the petitions for rehearing *en banc*.[3]

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[2] *See Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985), *Bosco v. Serhant*, 836 F.2d 271, 281 (7th Cir. 1987), *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1146 (7th Cir. 1985) and *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984).

[3] The individual defendants also filed a petition for rehearing *en banc*. While Judge Sykes stated that the County's petition "ha[d] considerable merit" and should

SUMMARY OF THE ARGUMENT

It is essentially undisputed that "the verdict form and jury instructions were badly botched in this case, inviting juror confusion and duplication of damages." *Thomas*, 604 F.3d at 314 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Both the majority below and Judge Sykes in dissent agree that the district court used a verdict form and gave jury instructions that invited the jury to assess damages by claim and to award damages by defendant. *Compare Thomas*, 604 F.3d at 312-313 (recognizing that the verdict form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery) and *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*) (stating her concern with the process by which a judgment was entered, "which the panel rightly acknowledges was flawed but wrongly declines to remedy").

The jury, to be sure, ultimately did what everyone agrees it should not have done: it assessed damages by claim and awarded damages by defendant. And the district court did what it

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have been granted, she also stated that the individual defendants' petition "raise[d] no issue worthy of the full court's review." *Thomas*, 604 F.3d at 314 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Consequently, Judge Sykes dissented in part from the denial of the petitions for rehearing *en banc*.

should not have done: aggregate the various damage amounts into a single judgment.

Nonetheless, the majority below issued an amended opinion affirming the jury verdict relying on the presumption that the jury followed the district court's instruction not to award compensatory damages twice for the same injury. *Thomas*, 604 F.3d at 311. Judge Sykes, however, correctly observed in her dissent that the instructions that came after the "no duplication instruction" robbed that instruction of any salutary effect. *Id.* at 317-318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Judge Sykes found that the district court accompanied the "no duplication instruction" with a "bewildering hodgepodge of instructions—some inapplicable, some simply wrong—[that] erased whatever effectiveness the no-duplication instruction might have had." *Id.* at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*).

The decision below, therefore, essentially provides a roadmap for litigants who seek to encourage juries to award duplicate awards in Section 1983 cases. As long as a district court at some point gives a "no duplication instruction," the remaining jury instructions on damages can be wrong or inapplicable without any consequence whatsoever.

In this regard, the decision below effectively creates a *per se* rule that a "no duplication instruction" renders error in other damage

instructions as irrelevant. This decision, which gives a "green light" to those litigants who would encourage juries to award duplicate damages, cannot be reconciled with or the decisions of the First Circuit in *Figueroa v. Alejandro*, 597 F.3d 423 (1st Cir. 2010), the Sixth Circuit in *Wilson v. Morgan*, 477 F.3d 326, 341 (6th Cir. 2007), the Eighth Circuit in *Fleming v. Harris*, 39 F.3d 905, 907 (8th Cir. 1994), the Ninth Circuit in *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) and the Tenth Circuit in *Street v. Parham*, 929 F.2d 537, 539 (10th Cir. 1991).

Those decisions hold that when reviewing jury instructions on the elements of a Section 1983 claim, courts determine "whether the charge in its entirety— and in the context of the evidence— presented the relevant issues to the jury fairly and adequately." *Figueroa*, 597 F.3d at 434, *citing Goodman v. Bowdoin College*, 380 F.3d 33, 47 (1st Cir. 2004).[4] Importantly, courts reviewed

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[4] *See also Wilson v. Williams*, 83 F.3d 870, 874 (7th Cir. 1996) (holding, in a Section 1983 action, that courts should "construe jury instructions in their entirety, seeking to determine if, as a whole, they were sufficient to inform the jury correctly of the applicable law"). In *Wilson*, the Seventh Circuit reversed and remanded the case for a new trial because an erroneous instruction confused the jury. The Court declared that it would "not guess as to what the jury actually believed in this case, we hold that the error in their instruction was not harmless, and therefore reverse and remand for a new trial." *Wilson*, 83 F.3d at 877. The Seventh Circuit

instructions "as a whole, not to determine whether they were flawless, 'but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to decide those issues." *Street*, 929 F.2d at 539, *citing Shute v. Moon Lake Elec. Ass'n. Inc.*, 899 F.2d 999, 1004 (10th Cir. 1990). *See also Shannon v. United States*, 512 U.S. 573 (1994), *citing Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (recognizing the "almost invariable assumption of the law that jurors follow their instructions").

When jury instructions are, as Judge Sykes described them, a "bewildering hodgepodge of inapplicable and incorrect instructions," the assumption that a juror would follow them should not comfort anyone. This Court should grant this petition and resolve the conflict between the circuits that the decision below has created regarding its *per se* rule on "no duplication instructions" in Section 1983 actions, the law of damages in Section 1983 actions, and the Seventh Amendment right to a fair jury trial.

REASONS FOR GRANTING THE PETITION

The majority acknowledged that the jury was not properly instructed on damages, *Thomas*, 604 F.3d at 311-313, and yet issued an opinion affirming the jury verdict. To accomplish this, the

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should have reached the same conclusion regarding the erroneous and highly confusing damage instructions in the present case but did not do so.

majority determined that the jury did not duplicate damages because they received a "no duplication" instruction. The majority, however, ignored the proverbial "elephant in the room"—the other jury instructions that directed the jury to assess damages by claim and by defendant.[5] As Judge Sykes observed:

> all the other claims in the case sought compensation for a single indivisible injury—Smith's suffering and death from pneumococcal meningitis while detained in the jail—though from more than one defendant and under multiple theories of relief.
>
> Nothing could be more common in a tort case. Personal-injury plaintiffs almost always sue every defendant plausibly within the causal chain under all available legal theories. But the presence of multiple claims and multiple defendants does not mean that damages are assessed "by claim" or "by defendant," and that's how the

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[5] The jury awarded $3,000,000.00 against the County, $1,000,000.00 against the Sheriff (who the Seventh Circuit later dismissed), and $150,000.00 collectively against the three individual defendants Sanchez, Facundo, and Toomey. This demonstrates that the jury awarded damages by Defendant for a single, indivisible injury.

> district court submitted this case to the jury.

Thomas, 604 F.3d at 314-315 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). In short, the district court "incorrectly submitted the question of damages to the jury, resulting in duplicative separate awards, which the court then improperly aggregated." *Id.* at 315.[6]

The majority preserved the jury's verdict but did so at a steep cost: the issuance of a decision that conflicts with law from other circuits regarding the proper review of jury instructions, the law of damages in Section 1983 cases, the improper aggregation of tort damages against several defendants for a single, indivisible injury and the Seventh Amendment right to a fair jury trial.

Consequently, and in accordance with the criteria set forth in Supreme Court Rule 10(a) and 10(c), this Court should grant this petition.

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[6] Although the verdict form did not provide for the insertion of the name of any Defendant, the jury inserted the names of the County and Sheriff in awarding $3,000,000.00 against the County and $1,000,000.00 against the Sheriff. This demonstrates both the power and the corrosive effect of the totality of the district court's erroneous damages instructions.

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM THE FIRST, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS REGARDING THE *PER SE* RULE EFFECTIVELY ADOPTED BELOW THAT A "NO DUPLICATION OF DAMAGES" INSTRUCTION TO THE JURY IN A SECTION 1983 CLAIM CURES ANY ERROR THAT MAY RESULT FROM OTHER INCORRECT DAMAGE INSTRUCTIONS.

The decision below concedes that a verdict "form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery." *Thomas*, 604 F.3d at 313. This admonition is, however, pure *dicta*.[7] In its actual holding, the majority affirmed a jury verdict where the verdict form and jury instructions invited the jury (which accepted the invitation) to commit error by awarding damages by defendant and by claim for a single indivisible injury.

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[7] The precedential value of a case lies in its holding and not in its *dicta*, suggestions or advice. *See, e.g., United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (recognizing this Court's "customary refusal to be bound by *dicta*"), *Beneficial Nat'l Bank v.* Anderson, 539 U.S. 1, 17 (2003) (Scalia, J., dissenting) (stating that "[*d*]*icta* of course have no precedential value").

The panel below did not overturn this verdict for one solitary reason—the district court gave the jury a no duplication of damages instruction. However, the notion that the jury was not instructed to duplicate damages is a myth. As Judge Sykes observed, the instructions that came after the "no duplication instruction" robbed that instruction of any salutary effect:

> But immediately after this no-duplication instruction, the [district] judge confusingly told the jury:
>
> > "Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all his [sic] injuries. You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim.
> >
> > Although there are multiple defendants in this case, it does not necessarily follow that if one is liable, all or any of the others are also liable. Each defendant is entitled to fair, separate and individual consideration of his or her case without regard to your decision as to the other defendants.

> If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.
>
> You may find that more than one defendant is liable for a particular injury.
>
> If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant who[m] you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages.
>
> If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable without determining individual percentages of liability.

Id. at 317-318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Here, the "no duplication instruction" was not clear because the jury was flooded with a proverbial tidal wave of

contradictory instructions that led it to assess damages by claim and award damages by defendant. *Id.* at 318.

Judge Sykes further observed that "[t]he [jury] instructions also appear to have invited the jury to decide the issue of joint liability, which is a legal question for the court." *Id.* What's more, the jury's deliberation resulted in "duplicative separate awards, which the court then improperly aggregated." *Id.* at 314.

Even the majority below recognized that "[m]ost of the issues surrounding the damages award in this case could have been avoided with a better verdict form, and we take this opportunity to offer some general guidance on what the proper sequence of inquiries on a civil verdict form should be." *Id.* at 312-313. The majority also recognized that "[t]he [verdict] form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery." *Id.* at 313. Ironically, that is exactly what happened here and that is what the Seventh Circuit affirmed.

A *per se* rule that a "no duplication" instruction cures any other error regarding damage instructions in a Section 1983 case cannot be reconciled with the decisions of the First, Sixth, Eighth, Ninth and Tenth Circuits in *Figueroa*, *Wilson*, *Fleming*, *Oviatt* and *Street*. In these cases, the courts viewed jury instructions as a whole when reviewing jury instructions on various elements of Section 1983. *See Figueroa*, 597 F.3d

at 434 (reviewed jury instructions as a whole when considering whether instructions on First Amendment retaliation claim was proper); *Wilson*, 477 F.3d at 341 (reviewed jury instructions as a whole when determining whether "the jury instructions on probable cause and comparative fault were incorrect, inadequate, and prejudicially misleading"); *Fleming*, 39 F.3d at 907 (reviewed jury instructions as a whole when considering the elements of plaintiff's excessive force claim were properly presented to the jury); *Oviatt*, 954 F.3d at 1481 (reviewed jury instructions as a whole to determine whether the jury was properly instructed on causation in Section 1983 claims); and *Street*, 929 F.2d at 539 (reviewed jury instructions as a whole to determine whether the jury was properly instructed on qualified immunity).

In the present case, the majority did not review the instructions on tort damages in a Section 1983 claim as a whole, but instead focused upon a solitary instruction—the "no duplication of damages" instruction. In the final analysis, however, the majority "relie[d] too heavily on the presumption that jurors follow their instructions—a presumption that is unwarranted given the circumstances, or at least cannot bear the weight the panel assigns to it." *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*).

When read as a whole, the jury instructions in the present case directed the jury to award damages by claim and by defendant. In concluding

that an isolated "no duplication" instruction absolved the error resulting from the other erroneous damage instructions, the majority decision conflicts with the decisions of the First, Sixth, Eighth, Ninth and Tenth Circuits in *Figueroa*, *Wilson*, *Fleming*, *Oviatt* and *Street*. This Court should grant the petition to resolve the conflict.

II. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM THIS COURT AS WELL AS THE THIRD, FIFTH, SIXTH, SEVENTH AND TENTH CIRCUITS REGARDING THE LAW OF DAMAGES IN SECTION 1983 ACTIONS AND THE SEVENTH AMENDMENT RIGHT TO A FAIR TRIAL.

A. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN CAREY AND STRACHURA REGARDING THE APPLICATION OF THE LAW OF DAMAGES IN SECTION 1983 CASES.

This Court has long recognized that Section 1983 "creates a species of tort liability" and that a Section 1983 "suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *See, e.g., City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *see also Meyer v. Holley*, 537 U.S. 280, 285 (2003) (recognizing that "when Congress creates a tort action, it legislates against a legal background of

ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.").

In the absence of proof of actual injury in a Section 1983 action, a plaintiff may only recover nominal damages. *Carey v. Piphus*, 435 U.S. 247 (1978). In *Carey*, this Court stated:

> But over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under Section 1983 as well.

Carey, 435 U.S. at 257-258. Subsequent to *Carey*, this Court reversed a judgment in a Section 1983 action where the district court erroneously instructed the jury that it could award compensatory damages based on the abstract value of a constitutional right. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

In the present case, the district court did not follow common law damage principles when instructing the jury and the both the jury verdict and the judgment entered on that verdict are not faithful to such principles. Given the invitation in

the jury instructions to assess damages by claim and by defendant, one can only hazard to guess what the jury determined when it assessed damages against the County, the Sheriff of Cook County and the individual defendants.

Previous cases from the Seventh Circuit recognized that damages could not be awarded by claim or by defendant for a single, indivisible injury in a constitutional tort case. *Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985), for example, featured confusion with multiple verdict forms similar to the confusion with the jury verdict forms in the present case. In *Watts*, a prison assault case, the plaintiff filed Section 1983 claims against five correctional employees. The defendants were jointly and severally liable but the five verdict forms potentially allowed the jury to apportion damages among various defendants. As in the present case, the jury was instructed to consider each defendant's case individually but was not instructed to reach a total damage figure and then divide it up among the defendants. The jury entered $40,000 awards on each of the individual's verdict forms. In post trial proceedings, the plaintiff claimed the jury had awarded a total of $200,000 and the defense argued that the jury had awarded only $40,000 as a total figure. The Seventh Circuit declined to follow the plaintiff's contention that the total verdict was $200,000 for two reasons. First, such an interpretation would violate the principle of joint and several liability. Second, the jury was not instructed to reach a damage figure and divide it up among the defendants. The Seventh Circuit,

therefore, found that it could not accept plaintiff's position without assuming that the jury disregarded the jury instructions. *Watts*, 774 F.2d at 180-181. Because the jury's intention was unclear as to whether the total award was $40,000 or $200,000, the court remanded the case for a new trial on damages.

Unfortunately, as Judge Sykes observed, the majority decision "conflicts with *Watts*." *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The majority decision likewise conflicts with *Carey* and *Strachura*, as it authorizes the award of duplicate damages for a single injury. This petition should be granted to resolve this conflict.

B. THE DECISION BELOW CANNOT BE RECONCILED WITH DECISIONS OF THE SIXTH AND TENTH CIRCUITS REGARDING THE APPORTIONMENT OF DAMAGES FOR A SINGLE, INDIVISIBLE INJURY AMONG TORTFEASORS WHO ARE JOINTLY AND SEVERALLY LIABLE.

Judge Sykes observed that the decision below "approve[d] the aggregation of improper separate damages awards in a single-injury joint-liability case; this has consequences for the law of damages in our circuit." *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The majority decision has implications beyond the Seventh Circuit, as well, due to its resolution of this aggregation issue.

Other circuits have recognized that in Section 1983 claims, persons who concurrently violate others' civil rights are jointly and severally liable for injuries that cannot be apportioned among the joint tortfeasors. *See, e.g., Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996), *citing* Restatement (Second) of Torts § 433B; *see also Patrick v. City of Detroit*, 906 F.2d 1108, 1114-16 (6th Cir. 1990) ("apportionment is improper when only joint and several liability is to be considered"). The majority decision not only perpetuates a miscarriage of justice but also provides authority for aggregating individualized damage awards against multiple defendants for a single injury. This decision is, however, legally untenable, as it authorizes a wholly unprincipled manner of assessing and awarding damages.

In dissent, Judge Sykes stated that the majority decision, unlike the earlier Seventh Circuit decision in *Watts*, improperly endorsed aggregation in a situation where a jury makes separate damage awards against several defendants for a single, indivisible injury:

> [*Watts*] specifically *rejected* the remedy of aggregation for a verdict that improperly assesses damages "by defendant" in a single-injury joint-liability case.
>
> Although there are some differences between *Watts* and this case, the material similarity is this: The jury was improperly invited to award

> damages "by defendant" in a single-injury joint-liability case, and the question on appeal was whether the resulting separate damages awards may properly be aggregated. *Watts* answered this question "no" -- aggregation is *not* appropriate in this situation. Here, the error is even worse because the jury was invited to award damages "by defendant" *and* "by claim"--and was given unintelligible instructions to boot. Aggregation is no more appropriate here than it was in *Watts*.

Thomas, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The aggregation of separate damage awards against several defendants for a single injury cannot be reconciled with *Watts*, *Northington* or *Patrick*. This petition should be granted to resolve this conflict.

C. THE DECISION BELOW CANNOT BE RECONCILED WITH DECISIONS FROM THE THIRD, FIFTH AND SEVENTH CIRCUITS REGARDING THE SEVENTH AMENDMENT RIGHT TO A FAIR JURY TRIAL.

The County has a Seventh Amendment right to a fair trial by jury in this case. *See Bailey v. System Innovation, Inc.*, 852 F.2d 93, 98 (3rd Cir. 1988) ("fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right");

Latiolais v. Whitley, 93 F.3d 205, 207 (5th Cir. 1996); and *Lemons v. Skidmore,* 985 F.2d 354, 357 (7th Cir. 1993). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., concurring in the judgment) (stating that "[s]o basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms,'" *citing Estes v. Texas*, 381 U.S. 532, 540 (1965)). The manner in which the district court instructed the jury to assess damages and the district court's aggregation of the separate damage awards violated the County's right to a fair trial, a right guaranteed under the Seventh Amendment.

Plaintiff's constitutional tort claims alleged a single, indivisible injury—Smith's death. *Thomas*, 604 F.3d at 314-315 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The County did not receive a fair trial on these claims because of the jury was invited to assess damages by defendant and by claim and because the district court aggregated the separate damage awards into a single judgment.

This Court has recognized that:

> there can be no doubt that claims brought pursuant to Section 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, Section 1983 provides relief for invasions of rights protected under federal law.

> Recognizing the essential character of the statute, "we have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability"

City of Monterey, 526 U.S. at 709. This Court then stated that its "settled understanding of Section 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law." *Id.* at 710. *City of Monterey* shows that Plaintiff's constitutional tort claims are actions at law and, under the Seventh Amendment, the County had a right to a fair jury trial on such claims. The trial below was not fair because of the manner in which the case was submitted to the jury.

The district court invited the jury to award the damages for a single injury by defendant and by claim, added the separate damage awards together and then entered judgment in the aggregate amount. That approach deprived the County of a fair trial (*i.e.*, its right to have the jury determine liability and then assess damages for the single injury in this case).

The decision below conflicts with the decisions of the Third, Fifth and Seventh Circuits in *Bailey*, *Latiolais* and *Lemons* and this Court's decision in *City of Monterey* with regard to the application of the right of a fair trial under the Seventh Amendment. The petition should be granted to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AMENDED AND FILED MAY 3, 2010

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 08-2232, 08-2233, 08-2482, 08-2597 & 08-2948

MARLITA THOMAS,

Plaintiff-Appellee,

v.

COOK COUNTY SHERIFF'S DEPARTMENT, ALEX SANCHEZ, JESUS FACUNDO, TERRENCE TOOMEY, AND COOK COUNTY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04 C 3563—**Ruben Castillo**, *Judge.*

ARGUED DECEMBER 9, 2008—
DECIDED DECEMBER 1, 2009 AMENDED MAY 3, 2010*

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* On consideration of Defendant-Appellant Cook County's petition for rehearing and rehearing en banc, the panel has amended its opinion. A judge called for a vote on the petition for rehearing en banc, but a majority of active judges voted to deny rehearing. Circuit Judges Posner, Sykes, and Tinder voted to grant en banc rehearing. Judge Sykes has written an opinion, which Judges Posner and Tinder have joined, dissenting from the denial of the petition. On consideration of the individual Defendants-Appellants' petition for rehearing and rehearing en banc, all members of the original panel have voted to deny the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc. Judge Rovner did not take part in consideration of either petition.

Appendix A

Before FLAUM, WOOD, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Norman Smith, a thirty-two-year-old pretrial detainee, arrived at Cook County Jail on April 24, 2004, and died less than a week later from pneumococcal meningitis. His mother, Marlita Thomas, sued Cook County, the Cook County Sheriff, and a number of correctional employees under 42 U.S.C. § 1983, alleging that the defendants violated her son's constitutional rights by failing to respond to his serious medical needs. Thomas also alleged various state law claims. At trial, a number of Smith's fellow inmates testified that Smith's condition rapidly deteriorated while prison officials turned a blind eye. The jury agreed with this assessment. It returned a verdict in Thomas's favor and awarded damages in the amount of $4,450,000 against Cook County, the Sheriff, and three individual officers. The district court denied the defendants' motion for judgment as a matter of law and the defendants now appeal. Specifically, they challenge the sufficiency of the evidence supporting each of the jury's liability determinations, the trial court's evidentiary rulings, and the jury's compensatory damages calculation.

We conclude that the jury had sufficient evidence to impose liability against the officers for their deliberate indifference to Smith's medical needs. The same is true for Cook County, as the evidence against it was sufficient for a reasonable

jury to conclude that the County had a widespread policy of disregarding detainees' medical requests. We do not find sufficient evidence, however, to hold the Sheriff liable. The causal connection between the Sheriff's policies and practices and Smith's death is tenuous in light of the jury's finding that individual correctional officers deliberately disregarded Smith's medical needs. Nonetheless, the Sheriff's absence as a liable party does not affect the jury's compensatory damage award. The parties are jointly and severally liable for the entire award, which measures the amount required to compensate the plaintiff for her indivisible harm, and the Sheriff only added an additional source from whom the plaintiff could collect. That the Sheriff is no longer liable does not limit the amount of damages to which the plaintiff is entitled.

Nor is the amount affected by the jury's improper allocation among defendants. Because we presume that jurors follow the instructions given, we must interpret the jury verdict to be consistent whenever possible. As a result, we interpret the jury's allocation in this case as an attempt to split the total damages among the defendants, rather than an effort to issue duplicate awards for the same injury. We also do not find a $4,000,000-plus damage award for constitutional violations that resulted in death to be excessive.

Finally, none of the defendants' evidentiary challenges warrant a reversal. Although we are

somewhat troubled that the jury only heard the deposition testimony of a key witness and did not have the opportunity to assess his credibility on the witness stand, the district court's decision to admit the testimony was not an abuse of discretion. And even if it was, corroborating live testimony from other witnesses, along with the defendants' opportunity to cross-examine during the deposition, render its admission harmless. Therefore, we affirm the district court's order denying the officers and Cook County's motions for judgment as a matter of law and for a new trial. But we reverse its judgment denying the Sheriff's motion, and remand with instructions to enter judgment in the Sheriff's favor.

I. BACKGROUND

The Cook County Department of Corrections ("CCDOC") maintains a procedure for examining inmates' health and a system designed to ensure that inmates receive appropriate medical care while incarcerated. Upon arrival at Cook County Jail, each inmate must undergo a medical examination conducted by medical personnel from Cermak Health Services of Cook County ("Cermak"), which runs the health service for detainees at Cook County Jail. Beyond the initial intake procedure, Cermak provides additional medical services to inmates as needed. Each day, a Cermak medical technician is required to visit the tiers, where the inmates reside, and dispense medication, respond to inmate complaints, and collect medical request forms. The technicians

then record, in daily contact sheets, the medications dispensed during their rounds, the medical request forms collected, and any other pertinent information, including reports of inmate sickness. In addition, Cermak maintains an infirmary, mental health facility, lab, pharmacy, and emergency room staffed by physicians, all onsite and within close proximity to the inmates.

For a number of reasons, this system did not always function as it should. First, the Supervisor for Cermak's medical technicians ("CMTs") acknowledged that Cermak had experienced problems with CMTs not picking up medical request forms every day. Some CMTs did not have the keys to access the lockbox where inmates deposited their completed medical request forms. Others simply failed to fill out or turn in their daily contact sheets. Further, a number of correctional officers reported that Cook County Jail was severely understaffed. The officers, who were employed by the Cook County Sheriff, kept daily logs in which they often made references to the dangers associated with cross-watching—a practice that required one officer to watch two tiers at the same time. One officer noted that cross-watching created a "major security risk." Another complained that he "[could] not be on both tiers at [the] same time." As a result of the understaffing and cross-watching in Cook County Jail, officers could not perform physical security checks with the frequency required by Sheriff department policy. Also, with fewer officers on

duty, CMTs were, at times, unable to gain access to the tiers to complete their rounds.

The plaintiff alleged that her son, Norman Smith, fell through the cracks created by the systemic problems in CCDOC. Smith's tragic story began on April 23, 2004 when Chicago police officers arrested him for possession of a controlled substance. The next day, he arrived at Cook County Jail, the facility where he was to remain until his trial date. Smith underwent the typical intake routine, which included a chest X-ray, blood pressure screening, psychological screening, and a review of his medical history. Those tests only revealed elevated blood pressure, for which Smith received a week's supply of medication. However, according to Smith's cellmate, Carlos Matias, Smith demonstrated symptoms of illness on the first day he arrived. Matias testified in his deposition that Smith appeared to be dizzy, began vomiting, and asked Matias to initiate a medical request for him.

Other detainees, along with Matias, testified to the rapid deterioration in Smith's condition through the week. For instance, Smith's other cellmate, Corey Mitchell, testified that Smith was vomiting for three to four days before Mitchell was released Thursday, April 29, 2004, and that he wasn't able to hold down any food or maintain conversations with his cellmates. Matias also testified that by Wednesday, April 28, 2009, Smith could no longer walk on his own. Instead, Matias would drag Smith outside of his cell where he

remained on the floor. Several inmates claimed to have filled out medical request forms on Smith's behalf. Others testified that they complained directly to correctional officers and medical technicians on duty at the time, and a few even witnessed or helped Smith fill out his own medical request forms. None of the inmates received a response to these requests.

Early Friday morning, April 30, 2004, Matias awoke to find Smith convulsing on the floor in his cell. He alerted Alex Sanchez, who was the officer on duty at the time, and Sanchez contacted his supervisor, Sergeant James Monczynski. However, the plaintiff contended that significant delays prevented Smith from receiving immediate care. First, Sergeant Monczynski did not arrive at the cell until about a half hour after Officer Sanchez notified him of Smith's condition. Next, Sergeant Monczynski contacted a Cermak paramedic, who was located in an adjacent building connected by a courtyard, and the plaintiff alleged that it took another half hour for the paramedic to arrive. The plaintiff also claimed that the paramedic spent a half hour in the tier office looking for Smith's I.D. before he called the other Cermak paramedics.

The delays allegedly continued as the paramedics did not have the manpower to lift Smith up the stairs in a gurney. So they waited at the top of the stairs. Fortunately, a few inmates intervened, carried Smith to the gurney, and the paramedics wheeled him out. Smith died later that morning. The Cook County medical examiner

determined that he suffered from pneumococcal meningitis, a particularly deadly form of the disease.

Based on these events, Marlita Thomas, Smith's mother, sued a number of individual correctional employees, the Cook County Sheriff, and Cook County under 42 U.S.C. § 1983 for violating Smith's constitutional rights by ignoring his serious medical needs, along with other state law claims. After a two-week trial, the jury returned a verdict against Cook County, the Sheriff, and Officers Facundo, Sanchez, and Toomey for a total award of $4,450,000, comprised of $4,150,000 in federal § 1983 damages and $300,000 in state claim damages. On the § 1983 verdict forms, the jury apportioned the $4,150,000 award into three parts: $3,000,000 against Cook County, $1,000,000 against the Sheriff, and $150,000 against the individual defendants collectively. On the verdict form for the state wrongful death claim, the jury awarded $150,000 against the individual defendants collectively. On the verdict form for the state survival claim, it also awarded $150,000 against the same individual defendants collectively. The district court ordered a remittitur of the total award from $4,450,000 to $4,150,000,[1] resulting in a final

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[1] The $300,000 remittitur had two components. Half of the amount remitted was the $150,000 state survival claim award, on the basis that it was compensating the same injury as the damages awarded for the federal claim and was therefore duplicative. (The district court

award made up of $4,000,000 in federal § 1983 damages, and $150,000 in state wrongful death damages. The defendants moved for judgment as a matter of law or for a new trial, which the district court denied. The defendants appeal these denials and also challenge the damage award.

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did not remit the $150,000 wrongful death award because the court determined that the wrongful death damages were different from the damages for the survival claim. The survival claim damages addressed the same injury as the federal damages and were thus duplicative; the wrongful death damages addressed a different injury, suffered by a different party, and thus were not duplicative. See *Patch v. Glover,* 248 Ill. App. 3d 562, 618 N.E.2d 583, 591, 188 Ill. Dec. 13 (Ill. App. Ct. 1993) ("A wrongful death action is brought to compensate the surviving spouse and next of kin of a decedent for the pecuniary loss that they sustained . . . . A survival action is brought . . . for the benefit of the decedent's estate . . . . [and] permits the representative of the estate to prosecute a claim for the personal injury that the defendant could have brought had he lived.") (internal citations omitted); see also *Will v. Northwestern University,* 378 Ill. App. 3d 280, 881 N.E.2d 481, 495, 317 Ill. Dec. 313 (Ill. App. Ct. 2007) (same); *Johnson v. Provena St. Therese Medical Center,* 334 Ill. App. 3d 581, 778 N.E.2d 298, 308, 268 Ill. Dec. 312 (Ill. App. Ct. 2002) (Wrongful Death Act compensates parents for their loss)). The other half of the remittitur was $150,000 of the § 1983 damages, which we discuss further in Section E, *infra*. Neither portion of the $300,000 remittitur is an issue on appeal.

II. ANALYSIS

Following the jury verdict, the defendants filed a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), or, in the alternative, for a new trial under Rule 59. In that motion, the defendants argued that the evidence was insufficient to support both individual and municipal liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). We review de novo the district court's denial of judgment as a matter of law, but we do not weigh evidence or assess the credibility of witnesses. *Walker v. Bd. of Regents of Univ. of Wis. Sys.*, 410 F.3d 387, 393-94 (7th Cir. 2005). Instead, we draw all reasonable inferences in favor of the nonmoving party. *Tart v. Ill. Power Co.*, 366 F.3d 461, 478 (7th Cir. 2004). "Our job is to assure that the jury had a legally sufficient evidentiary basis for its verdict," *Houskins v. Sheahan*, 549 F.3d 480, 493 (7th Cir. 2008) (quoting *Filipovich v. K & R Express Sys., Inc.*, 391 F.3d 859, 863 (7th Cir. 2004)), and the "verdict must stand unless the officers can show that no rational jury could have brought in a verdict against [them]." *Von der Ruhr v. Immtech Intern., Inc.*, 570 F.3d 858, 866 (7th Cir. 2009) (internal quotation marks omitted).

A. Verdict Against Individual Officers

The individual defendants, Officers Facundo, Toomey, and Sanchez, first challenge the jury verdict finding them liable under 42 U.S.C. § 1983

for violating Smith's constitutional rights. The officers argue that the verdict was not supported by evidence or law because the officers' actions represent "inadvertence" at the most. Relying on *Palmer v. Marion* County, 327 F.3d 588, 592 (7th Cir. 2003), the officers claim that the plaintiff must demonstrate both subjective knowledge and intentional disregard of the risk to the inmate's safety. *See also Collins v. Seeman*, 462 F.3d 757, 761 (7th Cir. 2006).

A prison official violates a prisoner's Eighth Amendment rights, and, in this case, due process rights, when he displays deliberate indifference to a serious medical need.[2] *Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008) (citing *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005)). To establish such a violation, the plaintiff must first demonstrate that the condition was objectively serious. *Hayes*, 546 F.3d at 522. An objectively serious medical condition is one that "has been diagnosed by a physician as mandating treatment

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[2] The inmate in this case was a pretrial detainee. The Eighth Amendment, which prohibits cruel and unusual punishment, only applies to convicted prisoners, but we have held that pretrial detainees are entitled, under the Fourteenth Amendment's due process clause, to the same basic protection. *Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007). As a result, we apply the same legal standard to a claim alleging deliberate indifference to an inmate's medical needs, whether filed under the Eighth or Fourteenth Amendment. *Id.*

or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Id.* Next, the plaintiff must show that the official "acted with a sufficiently culpable state of mind." *Id.* This inquiry has two components. The official must have subjective knowledge of the risk to the inmate's health and also must disregard that risk. *Collins*, 462 F.3d at 761. The officers do not contest that Smith suffered from a serious medical condition. Instead, they argue that the evidence was insufficient to establish that they both knew of and disregarded the risk of harm.

A brief overview of the record reveals testimony describing in detail Smith's condition on the days leading up to his death. A number of witnesses reported that Smith was vomiting, coughing and exhibiting other signs of serious illness including nausea and lethargy. A fellow inmate reported that on April 29, 2004, the day when all three officer defendants were working, Smith was "coughing a lot, running back and forth to the bathroom, throwing up, just laying on the floor, not moving, not eating . . . .". Another inmate reported that Smith was lying on the floor in front of the cell—which would have placed him in the direct path of the officials when performing their rounds. Inmates testified that they complained or heard others complain to officers about Smith's condition during all three shifts: 7a.m.-3p.m., 3p.m-11p.m., and 11p.m.-7a.m., that were covered by Officers Facundo, Toomey, and Sanchez respectively. Finally, Officer Toomey testified that

he saw Smith that day, and, at one point, saw him lying in front of his cell.

Circumstantial evidence can be used to establish subjective awareness and deliberate indifference, *Hayes,* 546 F.3d at 524, and the examples above are just a few excerpts of testimony that placed a visibly ill Smith within plain view of the officers on duty the day before he died. The evidence suggests that the officers were aware of the risk to Smith's health, either from the inmates' complaints, or from his visible symptoms, *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1970) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."), and their failure to act could have led a jury to find that they ignored this risk.

As we stated earlier, we do not reweigh the evidence nor do we substitute our own credibility determinations, so we cannot accept the officers' invitation to ignore the inmates' testimony. The officers do not explain why the evidence, which clearly supports a finding of subjective knowledge, is legally insufficient. They only argue that it is "conflicting and specious." This is an argument better suited for cross-examination and closing statements than appellate review. When faced with conflicting, or even inconsistent testimony, the jury is free to believe one side over another. *See Taylor v. Bradley*, 448 F.3d 942, 951 (7th Cir. 2006); *Allen v. Chi. Transit Auth.*, 317 F.3d 696, 703 (7th Cir. 2003). And when the plaintiff's

witnesses here provided conflicting testimony, the officers had the opportunity to, and did, bring it to the jury's attention. Ultimately, the inconsistencies the officers press seem slightly exaggerated as most of the inmates presented the same basic story: Smith was very ill, the three guards on duty on April 29 knew about it, and they did nothing.[3] As such, we find no error in the district court's decision to deny the officers' motion for judgment as a matter of law.

B. Verdict Against Cook County

At trial, the plaintiff alleged that the following unofficial customs or practices caused the constitutional harm and subsequent death of her son: the failure to have a system in place to allow for prompt review of inmates' medical requests, the practice of severely understaffing correctional officers, and the failure to fix the broken video monitors in Cook County Jail. The jury ruled in the plaintiff's favor and entered a verdict against both Cook County and the Sheriff. Any one of the alleged policies or practices may support a judgment against a governing body. Cook County, however, contends that the verdict cannot stand as a matter of law. It argues that the district court should have directed a verdict in its favor after all

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[3] For example, Smith's cellmate, Corey Mitchell, testified that Smith was vomiting for three to four days before his release and that he was not able to hold down any food or maintain conversations.

of its employees were acquitted, and that it cannot be held liable for the actions of the Sheriff's officers. The Sheriff and the County also dispute whether the evidence supports the grounds upon which the jury found them liable. So the questions we address are whether the plaintiff presented sufficient evidence of a widespread custom or practice, and, if so, whether the County can be held liable.

A local governing body may be liable for monetary damages under § 1983 if the unconstitutional act complained of is caused by: (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority. *Monell,* 436 U.S. at 690; *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 674 (7th Cir. 2009). To demonstrate that the County is liable for a harmful custom or practice, the plaintiff must show that County policymakers were "deliberately indifferent as to [the] known or obvious consequences." *Gable v. City of Chi.*, 296 F.3d 531, 537 (7th Cir. 2002). In other words, they must have been aware of the risk created by the custom or practice and must have failed to take appropriate steps to protect the plaintiff. *Id.* Therefore, in situations where rules or regulations are required to remedy a potentially dangerous practice, the County's failure to make a policy is also actionable. See *Sims v. Mulcahy*, 902 F.2d 524, 543 (7th Cir. 1990) (quoting *Jones v. City of Chi.*, 787 F.2d 200, 204-05 (7th Cir. 1986)).

We do not adopt any bright-line rules defining a "wide-spread custom or practice." As we stated in *Cosby v. Ward,* there is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, "except that it must be more than one instance," 843 F.2d 967, 983 (7th Cir. 1988), or even three, *Gable*, 296 F.3d at 538 ("[T]hree incidents where vehicle owners were erroneously told that their vehicles were not at Lot 6 do not amount to a persistent and widespread practice.") (internal quotation marks omitted). But the plaintiff must demonstrate that there is a policy at issue rather than a random event. This may take the form of an implicit policy or a gap in expressed policies, *Phelan v. Cook County,* 463 F.3d 773, 790 (7th Cir. 2006) (citing *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005)), or "a series of violations to lay the premise of deliberate indifference." *Palmer*, 327 F.3d at 596 (citation omitted). Beyond these threshold requirements, the jury must make a factual determination as to whether the evidence demonstrates that the County had a widespread practice that the alleged constitutional harm. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 928 (7th Cir. 2004).

The plaintiff presented evidence of County customs and practices that caused Smith's death. There was evidence of a widespread practice of failing to review inmates' timely filed medical requests, such as testimony from the supervisor for Cermak's CMTs, Woodroe Winfrey, that medical request forms were not collected every

day. The request forms were placed in a locked box, to which, at the time of Smith's death, many CMTs did not have keys. Further testimony suggested that many CMTs had not been told how to obtain keys to the lockboxes, that some CMTs were not turning in their daily encounter forms (which would disclose whether they collected medical request forms), and that Cermak did not have a reporting system for informing supervisors when CMTs failed to make their daily rounds. Jean Kiriazes, Cermak's director of continuous quality improvement and risk management, testified that she was aware the medical request forms were not collected each day, partly because guards were not available to allow the CMTs on the tier. A number of Cermak employees testified to, and other evidence corroborated, the practice of not retrieving medical requests on a daily basis, including on April 29, 2004, the day before Smith died. We are not dealing with an isolated act of an individual employee, which would be insufficient to establish a widespread custom or practice. *Monell*, 436 U.S. at 691-94. Instead, the jury heard a number of County employees, some of whom were policymakers, testify about a practice that went on for an extended period of time. The dangers of delayed responses to medical requests are readily apparent, and the former director of Cermak seemed to acknowledge as much in his testimony.

The trial testimony also established a link between the failure to check medical requests and Smith's death. Fellow inmate George Robotis

testified that on April 28, 2004, he filed a medical request form on Smith's behalf, which he submitted directly to an officer working the tier that morning. On the form, he wrote that because Smith could not move, he was writing on Smith's behalf, and that Smith was not eating, could not get out of bed, was throwing up, and was very ill. Corey Mitchell, who shared a cell with Smith for a short period, testified that he saw Smith fill out a medical request form (although he didn't remember if Smith submitted it to the guard). Alan Robinson, another inmate, testified that he completed a medical request form for Smith "at least three times," in which he reported that Smith was dizzy, nauseous, vomiting, and that he had seen others submitting written requests for Smith. And the list goes on. Two doctors further testified that pneumococcal meningitis is almost always fatal if not treated, but mortality is no more than 30% if treated. And the plaintiff's expert, Dr. Ben Katz, testified that Smith would have exhibited symptoms of meningitis (vomiting, nausea, fever) by the evening of April 27, 2004. The testimony at trial leads us to conclude that the jury had a sufficient basis to find a widespread practice of CMTs failing to collect medical request forms, and that this failure caused Smith's death.

Furthermore, we find unpersuasive the County's argument that it cannot be held liable under *Monell* because none of its employees were found to have violated Smith's constitutional rights. In support of its argument, the County cites *Los Angeles v. Heller*, 475 U.S. 796, 106 S.

Ct. 1571, 89 L. Ed. 2d 806 (1986). The Supreme Court in that case determined that a municipality could not be held liable for constitutional violations based on the actions of one of its police officers after the jury found that the individual officer did not inflict any constitutional harm. *Id.* at 799. The Court reached this conclusion, however, under different factual circumstances and for different reasons which do not apply here.

The plaintiff in *Heller* sued the City of Los Angeles and individual members of the police force for damages under § 1983, alleging that the officers arrested him without probable cause and used excessive force in making the arrest. *Id.* at 797. On the constitutional claims, the jury returned a verdict for the individual officer, and the Supreme Court agreed that the district court properly dismissed the claim against the City. *Id.* at 798-99. The Court noted that the jurors were not instructed on any affirmative defenses that the individual officer may have asserted, nor were they presented with any qualified immunity issues. *Id.* at 798. The absence of these defenses is significant. If, for instance, the officer had pled an affirmative defense such as good faith, then the jury might have found that the plaintiff's constitutional rights were indeed violated, but that the officer could not be held liable. In that case, one can still argue that the City's policies caused the harm, even if the officer was not individually culpable. Without any affirmative defenses, a verdict in favor of the officer necessarily meant that the jury did not believe the

officer violated the plaintiff's constitutional rights. And since the City's liability was based on the officer's actions, it too was entitled to a verdict in its favor.

The County, in this case, appears to push for a rule that requires individual officer liability before a municipality can ever be held liable for damages under *Monell*. This is an unreasonable extension of *Heller*. What if the plaintiff here had only sued the County, or didn't know, because of some breakdown in recording shifts, who the CMTs on duty were? The actual rule, as we interpret it, is much narrower: a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict. *See Heller*, 475 U.S. at 798-99; *see also id.* at 801 (Stevens, J., dissenting). So, to determine whether the County's liability is dependent on its officers, we look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth. *See Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002). The plaintiff in this case alleged that the failure to respond to Smith's medical requests caused his death and violated his right to due process. The jury instructions on the claim listed three elements, each of which the jury had to find by a preponderance of the evidence: "1. Norman Smith had a serious medical need; 2. *[t]he [d]efendant was deliberately indifferent to Norman Smith's serious medical need;* and 3. [t]he [d]efendant's conduct caused harm to Norman Smith." (emphasis added). Based on these instructions, the jury could have found that the

CMTs were not *deliberately indifferent* to Smith's medical needs, but simply could not respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms. It is not difficult to reconcile the verdicts in this instance, and we see nothing amiss in holding the County liable even though none of the CMTs were individually responsible.[4]

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[4] The County also makes a somewhat undeveloped argument that it cannot be held liable based on the actions of the Sheriff's officers alone. That may be true because, in Illinois, the Sheriff is an independently elected officer who is accountable only to the people, rather than to the County board. *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (citing Ill. Const. Art. VII, § 4(c); *see also Franklin v. Zaruba*, 150 F.3d 682, 686 (7th Cir. 1998) ("the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board."); *Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995) ("Illinois sheriffs are independently elected officials not subject to the control of the county."). However, because the jury had sufficient basis to find that the failure to retrieve and act on the detainees' medical requests (which implicates the County's unofficial practice or custom) caused Smith's death, we need not address the additional arguments. Nor must we decide whether the evidence supported the other allegedly harmful policies or practices. The evidence supported the plaintiff's first theory of liability, and we can uphold the jury's verdict

C. Insufficient Evidence to Impose Liability Against Sheriff

The Sheriff also challenges whether he can be held liable for damages under *Monell*. The jury found the Sheriff liable based on the policy/practice of severely understaffing correctional officers, and the Sheriff believes the evidence is legally insufficient to sustain this verdict. The Sheriff argues that understaffing cannot be a basis for liability under § 1983, that there is no causal link between understaffing and Smith's death, and that the Sheriff has limited control of the budget so any fault lies with Cook County.

We begin with what appears to be the Sheriff's strongest argument: the absence of any causal link between its policies and Smith's death. *Monell* recognized that the premise behind a § 1983 action against a government body is "the allegation that official policy is *responsible* for the deprivation of rights." *Monell*, 436 U.S. at 690 (emphasis added). In applying the different theories of liability recognized under *Monell*, we have always required plaintiffs to show that their injuries were caused by the policies or practices complained of. See

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on that ground alone. *Cf. Griffin v. United States*, 502 U.S. 46, 60, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) (noting that a jury verdict should not be set aside merely on the chance that it was not supported by sufficient evidence "when there existed other grounds for which the evidence was sufficient").

Klebanowski v. Sheahan, 540 F.3d 633, 637 (7th Cir. 2008). This is an explicit requirement of § 1983 and an uncontroversial application of basic tort law. But in cases such as this, where individual defendants are commingled with governmental bodies, and the plaintiff alleges a litany of policy failures that interact to create some constitutional harm, it is sometimes easier to obscure the causal links between different actors.

The individual officers in this case (the Sheriff's deputies) were found liable because they displayed deliberate indifference to Smith's medical needs, yet the Sheriff was also found liable for its policy of severely understaffing the prison. The only way to reconcile these two verdicts is to find that both the officers' deliberate indifference *and* the policy of understaffing caused Smith's death. We find the latter unsupported by the evidence presented at trial. A number of inmates testified that they either complained or witnessed others complain to the officers about Smith's condition. At that point, the officers should have taken the steps necessary to investigate and ensure that Smith received medical attention.

The theory that understaffing may have also caused Smith's death, on the other hand, is too remote to support a verdict against the Sheriff. A governmental body's policies must be the *moving* force behind the constitutional violation before we can impose liability under *Monell*. *Woodward*, 368 F.3d at 927. In § 1983 actions, the Supreme Court

has been especially concerned with the broad application of causation principles in a way that would render municipalities vicariously liable for their officers' actions. *Brown*, 520 U.S. at 405 ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 267-68, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) (O'Connor, J., dissenting). That is why some courts distinguish between the acts that caused the injury and those that were merely contributing factors. *See Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 625 (11th Cir. 2007).

We need not make such a distinction here because the evidence presented at trial does not even establish that understaffing was a contributing factor. Because the jury held the individual officers liable, it must have found that the officers deliberately ignored Smith's condition. But the evidence does not demonstrate that their actions had anything to do with understaffing. No one testified or even argued that the officers would have acted differently if more of them were on duty. How many officers would the Sheriff need to hire to ensure that no one deliberately ignores a complaint or medical request? We do not know.

One possible theory that the plaintiff proposes is that the Sheriff's policy of understaffing

prevented the CMTs from retrieving the medical request forms submitted on Smith's behalf. Generally, inmates place their request forms in lockboxes, which are located within the tiers. The officers on duty must first grant the CMTs access into the tiers, after which the CMTs must use their own keys to retrieve the forms from the lockboxes. In other words, when the officers are understaffed, they may not be available to grant CMTs access to the tiers, and, by extension, the lockboxes. That is what the plaintiff suggests may have happened here. But the only evidence supporting this conclusion was testimony that CMTs have complained previously of being unable to access the tiers to retrieve the medical requests. Assuming the jury believed the witnesses who claimed to have submitted request forms on Smith's behalf, the plaintiff presented no evidence as to why *those* forms were not retrieved. No one testified that they could not have access to the tiers on the days Smith or the other inmates submitted requests. Some CMTs reported not having keys to the medical request lockboxes, and others did not turn in their daily encounter forms, so there was no way of knowing if they picked up the request forms. The plaintiff even argues (albeit to establish a widespread practice of CMTs failing to retrieve request forms) that one of the CMTs on duty on April 29, 2004, did not have a key to the lockbox and could not have opened it anyways. The relevant question for the causation requirement is whether the Sheriff's policy of understaffing was the reason the CMTs could not access the forms *on those days* that Smith and the

other inmates claimed to have submitted their requests. We see no evidence to suggest that it was.

Nothing occurs in a vacuum, and we have no doubt that additional factors, other than the officers' malfeasance, may be at play. Perhaps if the officers received better training, or if the jail was less crowded, they might not have ignored Smith's condition. All of this may be true, but it does not satisfy the causation requirement here. To hold otherwise would significantly expand *Monell* and lead us down the road to vicarious liability. So when individual officers are aware of, and make the conscious decision not to respond to, reports of an inmate's poor health, we cannot infer, without more evidence, that understaffing was the *moving* force behind the resulting injury.

D. Trial Court's Evidentiary Rulings

Cook County, the Sheriff, and the individual officers provide a long list of evidentiary rulings that they claim amounted to an abuse of discretion and warrant a new trial. Among the testimony and other evidence challenged on appeal are: Carlos Matias's deposition testimony, which was read to the jury; a doctor's statements contained in the Sheriff's death investigation report; hearsay statements admitted through Gilbert Yorke, an inmate; and a list of names that the plaintiff obtained of other inmates who had information on Smith's death. We review the district court's decision to admit testimony for an abuse of

discretion, and we will only reverse if the district court's evidentiary ruling was not harmless. *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 842 (7th Cir. 2001).

1. **Carlos Matias's Deposition Testimony**

Federal Rule of Civil Procedure 32 governs the use of deposition testimony during trial. That provision states, in part, that "a party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: . . . that the party offering the deposition could not procure the witness's attendance by subpoena . . . ." Fed. R. Civ. P. 32(a)(4)(D). Implicit in this rule is an obligation to use reasonable diligence to secure the witness's presence, and the district court has broad discretion to determine whether the proponent has satisfied this requirement. *Griman v. Makousky*, 76 F.3d 151, 154 (7th Cir. 1996). After two subpoenas, a show cause order, numerous phone calls, and a search by a private investigator, the plaintiff could not get Matias, who had since been released from custody, into court to testify. Pursuant to Rule 32, the district court allowed the plaintiff to read Matias's deposition testimony at trial, over the defendants' objections. The defendants argue that the plaintiff did not exercise reasonable diligence in procuring Matias's presence because: (1) the plaintiff was in constant contact with Matias, who was in Chicago, and should have been able to secure his presence; and (2) the district court should have compelled Matias to appear by issuing an arrest warrant but

chose not to based on the plaintiff's reassurances that Matias would appear.

Neither Rule 32 nor our case law required the district court to issue an arrest warrant for Matias before admitting his deposition testimony. In *Rascon v. Hardiman*, for instance, we upheld the district court's decision to admit a potential witness's deposition testimony after a private investigator and a process server were unable to subpoena the witness. 803 F.2d 269, 277 (7th Cir. 1986). Their efforts had satisfied the magistrate judge that the plaintiff exercised reasonable diligence, and we found no abuse of discretion in the judge's determination. *Id.* The defendants, however, attempt to distinguish *Rascon* on the grounds that the plaintiff in this case knew that Matias was in Chicago, and the plaintiff represented that Matias would appear to discourage the district court from issuing an arrest warrant. But knowledge of Matias's whereabouts does not detract from the court's finding that the plaintiff exercised reasonable diligence. Matias's location was never in dispute. In fact, he was subpoenaed twice. The problem was that Matias did not abide by court orders. And the district court found that the plaintiff's attempts to ensure Matias's compliance, including hiring a private investigator to transport Matias to the courthouse, met the reasonable diligence standard. We find no abuse of discretion here.

Reasonable diligence aside, it seems an additional step could have been taken to ensure

Matias's presence in court. In most cases, courts understandably elect live or even recorded testimony over transcripts read to the jury. *See, e.g., Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Griman*, 76 F.3d at 153. This preference should be even more pronounced for witnesses, like Matias, who may be instrumental to a party's case. *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 17 (1st Cir. 2000) ("[T]he live testimony of [key] witnesses for the purposes of presenting demeanor evidence [is] essential to a fair trial.") (citation omitted). The court had anticipated the possibility that Matias would not appear, and advised the parties to review his deposition. Under these circumstances, where everyone has notice that the witness may not comply with court orders, and the plaintiff knows his whereabouts, it would make sense to issue an arrest warrant. Nonetheless, that we may have done things differently in hindsight is beside the point. The court had broad discretion to determine whether the plaintiff's actions satisfied Rule 32's requirements, and we see no reason to reverse its ruling.

And even if we did find error, a number of other *live* witnesses corroborated the more significant or prejudicial statements in Matias's testimony. For example, Matias testified that, on April 24, 2004, Smith's first day in custody, Smith asked him to fill out a medical request form. Robotis said he had filled out a request form for Smith after Matias sent his form in, and Robinson stated that Smith was sick from the first day he arrived at jail. Both Matias and Mitchell also

testified that they witnessed Smith fill out a medical request form. By Smith's second day in custody, Matias claimed that he cleaned the vomit Smith left behind in the day room, and Mitchell testified that he too saw Smith vomiting in the day room. Also, Matias said that on April 28, 2004, a number of inmates told officers that "a man was really sick," referring to Smith. Robotis made similar statements when he testified to personally informing the guards working on the 28th that Smith was ill, and Mitchell recalled witnessing inmates approach medical technicians to request help for Smith. Finally, Matias testified that Smith could not walk and was lying on the floor, but Mitchell corroborated this statement when he described Smith as lethargic and "not moving" on April 29, 2004. The defendants had the opportunity to cross-examine Matias during his deposition, as well as the other inmates whose testimony corroborated Matias's accounts. Under these circumstances, the minimal prejudice to the defendants does not warrant a new trial.

2. Hearsay and Other Objections

The remaining evidentiary challenges can also be quickly resolved. Officer Raher testified that while investigating Smith's death, Dr. Analgate, the physician on duty when Smith was transported to the emergency room, told him (Raher) that he had heard that Smith had been complaining of illness. The problem with this testimony is that it is not very probative at all. *See* Fed. R. Evid. 403. It only shows that Raher spoke

to Dr. Analgate, and learned of Matias's complaints, on April 30—the day Smith was taken to the emergency room. His failure to interview more witnesses after the fact says nothing about the County's response to requests for medical attention. Similarly, Dr. Analgate did not indicate when he heard about Smith's complaints (whether before or on the 30th), so his statements do not tell us much about County policy either. Nonetheless, if any error occurred, it does not warrant a new trial. A number of inmates testified that they submitted medical request forms and complained directly to the officer, and it is unlikely that this testimony had an injurious effect on the verdict.

The other inmates' testimony also renders harmless the admission of Gilbert Yorke's statement and the alleged hearsay statements in Matias's deposition testimony. Yorke testified that Matias told him to sleep on the top bunk because Smith had been sick since he arrived on the tier (Smith and Yorke shared bunk beds), possibly inferring that the guards should have known that Smith was sick and responded. Even if Yorke's testimony could be read to allow this inference, the jury heard ample other testimony that other inmates had put the officer defendants on notice of Smith's condition, and so any error in admitting Yorke's testimony was harmless.

We find the defendants' remaining evidentiary challenges meritless. These include: Matias's deposition statement that he heard a nurse say that Smith was just "dope sick" and that there was

nothing she could do about it; the admission of the list given to the plaintiff containing the names of inmates who wanted her to know what happened to her son; the plaintiff's testimony about Smith's past jobs; the admission of Smith's resume; and the district court's decision to exclude evidence of Smith's previously unknown child. Matias's statement that a nurse told him that Smith was just "dope sick" is not hearsay. Federal Rule of Evidence 801(d)(2)(D) states that "[a] statement is not hearsay if . . . the statement is offered against a party and is the party's own statement, in either an individual or a representative capacity . . . or a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .". The plaintiff used the statement, made by a Cook County employee, to show that the County employees were deliberately indifferent to Smith's illness and had a widespread practice of ignoring medical requests; therefore, it was admissible.

Regarding the list of inmates, the plaintiff argues that the list was only offered to show how the plaintiff found the inmates who testified at trial. For this purpose, the list is not hearsay, but it is unclear why it was relevant in the first place. Many inmates on the list testified and described in detail Smith's condition in the days leading up to his death. As the district court noted, how the plaintiff found the inmate witnesses is of limited probative value. But for that same reason, its admission was also harmless. We cannot think of

any reasonable inference the jury could have made from the list that it could not have made from the inmates' testimony.

We also agree with the district court that the admission of Smith's resume and testimony about his past employment and education do not warrant a reversal. Rule 901(a) of the Federal Rules of Evidence states that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Smith's mother (the plaintiff) and girlfriend testified, based on their personal knowledge, to Smith's past employment and education, which included jobs at McDonald's, Dominick's, Clark gas station, T.E.A.M.S., and Commander Packaging. Any information in his resume was also presented through their testimony, which the defendants had an opportunity to challenge during trial. Finally, we see no error in the district court's decision to exclude any evidence of Smith's previously unknown fourth child. The County claims that the evidence would have enabled it to challenge the plaintiff's credibility because she had stated that Smith had only three children. The district court determined that evidence of a previously unknown child would not impeach the plaintiff, and the defendants have not demonstrated otherwise. None of these alleged infirmities entitle the defendants to a new trial.

E. The Jury's Verdict

The jury returned a total damage award of $4,450,000, which the district court remitted by $300,000 to $4,150,000. As we have explained, the district court eliminated the $150,000 award for the state survival claim because it duplicated the § 1983 award for Smith's injury. The district court also reduced the total verdict by the $150,000 that the jury awarded to the plaintiff against the individual defendants on the § 1983 verdict forms. Neither party appeals those remittiturs. Instead, the defendants argue that the post-remittitur $4,150,000 award is inconsistent and excessive. But this post-remittitur amount logically represents $4,000,000 in damages to Thomas for Smith's injury (no matter under what theory) and $150,000 to Thomas for her own injury as Smith's mother in connection with her state wrongful death claim. The defendants take issue only with the $4,000,000 portion of the remaining overall award. We review the district court's decision not to grant a new trial on damages for an abuse of discretion. *Houskins v. Sheahan*, 549 F.3d 480, 496 (7th Cir. 2008).

Although the district court instructed the jury against duplicative compensatory damage awards, the verdict form for the plaintiff's federal § 1983 claim provided spaces for the jury to enter damages for both denial of medical care (against the individual defendants) and policy and practice (against the County and the Sheriff), both of which

resulted in the same injury.[5] The jury entered $150,000 in damages against the officers collectively, $3,000,000 in damages against Cook County, and $1,000,000 against the Sheriff. As a result, it is unclear from the face of the verdict form whether the jury meant to allocate duplicate awards for the same injury, or whether it merely calculated total damages and allocated the amounts separately based on what it perceived to be each party's relative fault. Because we presume that juries follow the court's instructions, we will assume the latter, *Soltys v. Costello*, 520 F.3d 737, 744 (7th Cir. 2008), which is more consistent with the district court's instruction that the jury not award compensatory damages twice for the same injury.

This raises another question, however, because the defendants were jointly and severally liable, and allocating damages between the parties for the single indivisible injury alleged in this case was improper. See *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 821 (7th Cir. 1994). To remedy this error, the district court decided to place a ceiling at the highest

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[5] We note that while the defendants objected to the verdict form that was ultimately used, the version that they proposed was no better. The defendants' proposed jury verdict form also provided spaces for the jury to enter damages for both the denial of medical care and policy and practice theories, and even provided separate spaces for the jury to enter a damage award as to each individual defendant.

assessment of compensatory damages for a given claim, citing *Bosco v. Serhant*, 836 F.2d 271, 281 (7th Cir. 1987). *Bosco* suggests that in cases where a jury improperly apportions compensatory damages for a single injury among jointly liable defendants, one permissible approach to remedy the problem could be to place a ceiling on recovery at the highest assessment of damages that was assessed against any one defendant. *Id.* Here, however, while the highest damage award allocated to a single defendant was $3,000,000 assessed against Cook County, the district court established a "ceiling" of $4,000,000 by including the $1,000,000 award assessed against the Sheriff under the same *Monell* theory.

It appears that the district court combined two approaches in interpreting the compensatory damage awards. It placed a ceiling on the highest assessment of damages for a single injury (not a single defendant), by adding the awards allocated to different defendants (the Sheriff and Cook County). In doing so, the district court actually came up with a total that was $150,000 less than it might have been, when it established a ceiling of $4,000,000 for all of Smith's injuries. But this decision did not prejudice the defendants. As the district court recognized, we have previously suggested that a ceiling at the highest assessment of compensatory damages may be appropriate when a jury improperly allocates the award among defendants who are jointly and severally liable. *Bosco*, 836 F.2d at 281; *Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985). But our cases have also

sanctioned the approach of cumulating apportioned damages instead, when doing so better reflects the jury's intent. *See, e.g., Havoco of America, Ltd. v. Sumitomo Corp. of America*, 971 F.2d 1332, 1346 (7th Cir. 1992). Which of these approaches should be taken in a specific case will depend on a district court's interpretation of a jury's actions in that case, in light of the instructions the jury was given and the verdict form that was used. Ultimately, we interpret jury awards to avoid inconsistency, *Majeske v. City of Chi.*, 218 F.3d 816, 823 (7th Cir. 2000), and presume that juries follow the court's instructions. *Soltys*, 520 F.3d at 744. Here, assuming the jury avoided duplicate compensatory damage awards, as the court ordered, then a ceiling at the highest assessment would not accurately reflect the amount that the jury determined would compensate the plaintiff. Therefore, cumulating the damage awards—which the district court ended up effectively doing—would be more consistent with the presumption we apply to jury verdicts.

Under either theory, a $4,000,000 federal award does not exactly add up, but that does not present an issue due to the posture of this case on appeal. If the district court sought to establish a ceiling based on the highest damage assessment allocated to a defendant, that number would have been $3,000,000—the damage award entered against Cook County. If, on the other hand, the district court decided to add the allocated damages based on the presumption that the jury heeded its

instruction not to issue duplicate awards, then there was no need to exclude the $150,000 award against the officers, and the total amount of federal damages would have been $4,150,000. The plaintiff, however, does not challenge the $150,000 adjustment so we will not address it. *Cf. Luellen v. City of E. Chi.*, 350 F.3d 604, 612 n.4, 5 (7th Cir. 2003) (noting that arguments not raised on appeal are waived). Other than the reduction, which is not before us, we agree with the district court's decision to award the damages allocated to both Cook County and the Sheriff. The court presumed that the jury followed its instruction not to issue duplicate awards, and its decision not to grant a new trial for damages was not an abuse of discretion.

Moreover, our conclusion that the evidence was insufficient to hold the Sheriff's office liable under *Monell* does not affect the damages calculation. The defendants were jointly and severally liable for one indivisible injury, and the damage award represents the amount required to compensate the plaintiff for that harm. See *Petersen v. Gibson*, 372 F.3d 862, 864 (7th Cir. 2004); *Maul v. Constan*, 928 F.2d 784, 787-88 (7th Cir. 1991). That amount remains the same because it is tied to the injury itself. The plaintiff may collect the full amount from any one of the defendants, and the jury's decision to include the Sheriff among those liable merely added another source of collection. *Watts*, 774 F.2d at 180. Removing the Sheriff from this list, therefore, only removes that

potential source but does not affect the amount of damages to which the plaintiff is entitled.

Most of the issues surrounding the damages award in this case could have been avoided with a better verdict form, and we take this opportunity to offer some general guidance on what the proper sequence of inquiries on a civil verdict form should be. A verdict form should not ask a jury to assess damages before liability. In cases involving joint and several liability for a single indivisible injury, a verdict form should ask the jury first to indicate which, if any, of the defendants are liable. Second, if at least one defendant is found liable, the form should instruct the jury to determine the total amount of damages for the plaintiff's injury, an inquiry that is wholly separate from the liability decisions made in the first step.[6] The form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery.

A verdict form that takes a jury through these steps in this sequence—reinforced by clear instructions from the court not to duplicate damages or divide the amount among defendants—will go far to help future litigants avoid the problems that arose in this case. Tort

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[6] In a case involving comparative liability instead of joint and several liability, an additional step would occur, where the jury would be asked to apportion relative fault among the various parties.

concepts of single indivisible injuries and joint and several liability are potentially confusing for a jury, and verdict forms should help remedy potential confusion, not add to it.

The defendants also argue that the award was excessive. In particular, they note the discrepancy between the jury's allocation of damages against the individual and institutional defendants, and also point to damage awards in other cases in an attempt to show that the jury's verdict was unreasonable. "When the district court has remitted a portion of the jury's award and the defendant claims that the remitted award is still excessive," we review the evidence of damages in the light most favorable to the jury verdict and will only reverse if there is no rational connection between the evidence and the damage award. *Deloughery v. City of Chi.*, 422 F.3d 611, 619 (7th Cir. 2005).

Under the federal standard for reviewing compensatory damages we assess whether the award is "monstrously excessive," "whether there is no rational connection between the award and the evidence," and whether the award is comparable to those in similar cases. *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 611 (7th Cir. 2006). As we stated earlier, the jury's allocation of damages does not render the verdict unreasonable. Nor is it excessive in comparison to similar cases. *Estate of Moreland v. Dieter*, for example, involved a § 1983 claim based on the death of an inmate, and, while the officers' conduct in that

case was much more egregious, the jury awarded $29,000,000 in compensatory damages. 395 F.3d 747 (7th Cir. 2005). *Cf. DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678 (7th Cir. 1995) (upholding a $4,201,000 damage award for a plaintiff who was injured and lost his left arm while employed with Illinois Central Railroad). The defendants, however, point to various state court cases with lower compensatory damage awards. Aside from the fact that these cases allege different claims, "[a] court should not substitute a jury's damages verdict with its own figure merely because . . . a plaintiff in a similar case was perhaps not able to plead his facts to the jury as well." *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 485 (7th Cir. 2003).

Finally, we find sufficient evidence to support the award. Smith was only thirty-two years old and died of a treatable illness while in custody. Numerous witnesses testified that their attempts to obtain medical care for Smith, or to alert officials about Smith's condition were largely ignored. Smith had three children whom he supported and with whom he had a close relationship. The jury also heard evidence about Smith's employment history through witness testimony and the admission of Smith's resume. He had a solid work history that included McDonald's, Dominick's, Clark gas station, T.E.A.M.S., and working for Commander Packaging as a machine operator. Our review of the facts supporting the damage award and the district court's decision to uphold it is deferential.

"We are reluctant to substitute our assessment of the evidence in place of the discretion of the district court, exercised in light of what it witnessed at trial," *Deloughery*, 422 F.3d at 620, and we see no reason to do so here.

III. CONCLUSION

For these reasons, we AFFIRM the district court's denial of Cook County and the individual officers' motion for judgment as a matter of law, and we AFFIRM the district court's denial of the defendants' motion for a new trial. We REVERSE, however, the district court's denial of the Sheriff's motion for judgment as a matter of law and REMAND with instructions that the district court enter judgment in the Sheriff's favor.

SYKES, *Circuit Judge*, with whom POSNER and TINDER, *Circuit Judges*, join, dissenting in part from denial of rehearing en banc. The individual defendants in this § 1983 case have requested rehearing en banc but raise no issue worthy of the full court's review. In a separate request, Cook County has also asked for en banc rehearing, and its petition has considerable merit. The County maintains that the district court incorrectly submitted the question of damages to the jury, resulting in duplicative separate awards, which the court then improperly aggregated. I would grant the County's petition and address the important issues it raises regarding the law of damages in this circuit.

The verdict form and jury instructions were badly botched in this case, inviting juror confusion and duplication of damages. The district court added the jury's improper separate awards (the total: $4.45 million), ordered a modest remittitur, and entered judgment for $4.15 million. The panel acknowledged the errors in the verdict but affirmed anyway. The panel's amended opinion does the same, albeit with a bit more and slightly different explanation, as well as some "general guidance" for the future. Op. at 31-37. I appreciate the panel's effort at clarification. But even as revised, the opinion misreads our caselaw and validates an improper approach to tort damages in general and § 1983 damages in particular. Moreover, the guidance now offered is not meaningful because the panel has not fully

explained the flaws in the district court's verdict form and in the jury instructions on damages.

Here's a more complete description of the problem:

Plaintiff Marlita Thomas sued for damages stemming from the death of her son Norman Smith while he was a pretrial detainee in the Cook County Jail. She named Cook County, the sheriff, and eight individual jail employees as defendants, and stated several different claims for relief: a § 1983 claim against the individual defendants for their deliberate indifference to Smith's medical needs; a policy-or-practice § 1983 claim against Cook County and the sheriff under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); a state-law wrongful-death claim against the individual defendants; and state-law survival and emotional-distress claims against the individual defendants. Under Illinois law a wrongful-death claim compensates the decedent's next-of-kin—here, Thomas—for her own pecuniary loss. *See* Op. at 8-9 n.1 (explaining the distinction between wrongful-death and survival claims under Illinois law). But all the other claims in the case sought compensation for a single indivisible injury—Smith's suffering and death from pneumococcal meningitis while detained in the jail—though from more than one defendant and under multiple theories of relief.

Nothing could be more common in a tort case. Personal-injury plaintiffs almost always sue every defendant plausibly within the causal chain under all available legal theories. But the presence of multiple claims and multiple defendants does not mean that damages are assessed "by claim" or "by defendant," and that's how the district court submitted this case to the jury. Damages *may* be measured *by category*—that is, the verdict form may have separate line-item inquiries for economic damages (medical expenses, lost wages, and other pecuniary losses) and noneconomic damages (pain and suffering, loss of consortium, etc.). In a comparative-liability case (which this is not), the jury will also be instructed to apportion *fault* (not *damages*) by assigning percentages among the parties found to be causally responsible for the injury. But the jury in a single-injury case should not be asked to assess damages "by claim" or "by defendant." That approach invites duplication of damages and is especially problematic where liability is joint and several. As the panel has noted, liability among defendants in a § 1983 case is joint and several—at least in the usual case of one plaintiff with a single indivisible injury. *See Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1386-87 (7th Cir. 1984). Accordingly, in a typical § 1983 case—which this one was—the jury should *not* be invited to attribute different injuries to different claims, award compensatory damages "by claim," or assess damages separately against particular defendants. But that's exactly what happened here.

More specifically, the district court gave the jury a five-page "Verdict Form A." The first page pertained to the deliberate-indifference claim against the individual jail employees. The second pertained to the policy-or-practice claim against Cook County and the sheriff. The third, fourth, and fifth pages pertained to the state-law wrongful-death, survival, and emotional-distress claims against the individual employees. As to each separate claim, the jury was first asked to award an amount of damages *as to that claim*. The jury was then asked to decide the liability of each defendant on that claim by checking a "yes" or "no" box next to the name of the defendant. The jury was also given a general "Verdict Form B," which it was to use if it found for the defendants across the board.

This verdict form was manifestly improper in several important respects. An initial and obvious flaw was that it directed the jury to decide the question of damages *first*, which is backward. The district judge struggled to explain this bizarre upside-down verdict to the jury and eventually just punted, telling the jurors to disregard the physical layout of the verdict and "answer the [liability] questions first." This is a totally unacceptable mode of submitting a case to a jury. In fairness, this strange form of verdict was proposed by the plaintiff's attorney, and as the panel notes, the defendants' proposed verdict form was just as bad. *See* Op. at 32-33 n.5. But it's the judge's responsibility to get the verdict form right, not just pick one side's proposal or the other's. The

judge should have rejected both proposals and written a proper verdict form himself or insisted that the lawyers go back to the drawing board. To adopt a seriously flawed verdict form and then tell the jury to disregard its structure is a careless way to charge a jury; it invites juror confusion.

The verdict form also directed the jury to assess damages by claim, which as the panel acknowledges is legally incorrect in a case like this one involving a single indivisible injury. Finally, the verdict form invited the jury to award damages separately by defendant—that is, separately against the individual employees, Cook County, and the sheriff. This, too, is legally incorrect, and for the same reason: This case involves a single indivisible injury for which the defendants, if liable at all, are jointly and severally liable.

That the jurors were confused is evident from the verdict they returned. The jury awarded $150,000 on the deliberate-indifference claim and found three of the eight individual employees liable on this claim. On the *Monell* claim, the jury awarded $3 million in damages against Cook County and $1 million against the sheriff. The jury awarded $150,000 on the wrongful-death claim and found the same three individual employees liable on this claim, and also awarded $150,000 on the survival claim against these same employees. Finally, the jury returned a zero-damages, no-liability verdict on the emotional-distress claim. The district court tallied everything

up, ordered a $300,000 remittitur, and entered judgment for $4.15 million. *See* Op. at 8-9 n.1.

The amended opinion acknowledges the flaws in the verdict form but affirms nonetheless, relying on the general presumption that jurors follow their instructions and ultimately placing an appellate stamp of approval on the district court's unusual manner of reconciling the confusing verdict they returned. There are two major problems with the panel's decision: The jury instructions were just as incoherent as the verdict form, and neither of the verdict-reconciliation methods mentioned by the panel can be properly invoked here.

Taking the second point first, the panel says there are two possible ways to read the district court's postverdict decision on damages, although neither of them quite adds up. First, the panel notes that the judge "decided to place a ceiling at the highest assessment of compensatory damages for a given claim, citing *Bosco v. Serhant*, 836 F.2d 271, 281 (7th Cir. 1987)." Op. at 33. The panel reads *Bosco* as suggesting that "in cases where a jury improperly apportions compensatory damages for a single injury among jointly liable defendants, one permissible approach to remedy the problem could be to place a ceiling on recovery at the highest assessment of damages that was assessed against any one defendant."[1] *Id.* at 33-34. This is

[1] A recurring problem in the panel opinion is its use of the phrase "apportionment of damages" to describe

a considerable overreading of *Bosco*, which merely hypothesized the *possibility* of using the highest single assessment as a "ceiling" under these circumstances and neither adopted nor endorsed this method of reconciling a verdict with improper separate damages awards. The panel also cites *Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985), as support for this "ceiling" approach, Op. at 34, but *Watts* never uses the word "ceiling" and does *not* stand for the proposition that it is appropriate in this situation to enter judgment in the amount of the highest single damages award. (More on *Watts* in a moment.) Simply put, there is no solid support for the panel's suggested "ceiling" remedy.

In any event, the panel ultimately concludes that the judge didn't use the "ceiling" approach after all because the highest single damages award was $3 million (against Cook County), and the judge entered judgment for $4.15 million instead. So the panel surmises that the judge must

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what the jury did here. This terminology is incorrect as a matter of tort law. "Apportionment" is a comparative-liability concept; as I have earlier noted, in a comparative-liability case, the jury apportions *fault*, not *damages*. *See generally*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 1 *et seq.* (2000). This is not a comparative-liability case. The jury was not instructed on the principles of comparative fault. The panel's nomenclature problem, however, further illustrates the basic difficulty with this verdict.

have "combined two approaches in interpreting the compensatory damages awards"—the so-called "ceiling" approach and another method that "cumulates" improper separate awards. Op. at 34. Citing *Havoco of America, Ltd. v. Sumitomo Corp. of America*, 971 F.2d 1332, 1346 (7th Cir. 1992), the panel suggests that "cumulating" improper separate damages awards is appropriate "when doing so better reflects the jury's intent . . . in light of the instructions the jury was given and the verdict form that was used." Op. at 34-35.

Havoco does not support what the judge did here. *Havoco* was a single-injury case litigated on four theories of relief against a single defendant, and the jury was given a "no duplication of damages" instruction that was much clearer than the one used in this case. The jury in *Havoco* was instructed as follows: "Havoco seeks recovery for the same injury in more than one of its claims against Hill. You are instructed that if you have occasion to consider damages against Hill under more than one of Havoco's claims, you should not make duplicate damages awards for the same injury." *Havoco*, 971 F.2d at 1346 (quotation marks omitted). The jury returned separate damages awards on each of the four counts. The district court added them up and entered judgment for the total; this court affirmed. Based on the clarity of the no-duplication instruction, we said we would "presume that the damages the jury awarded on each of the four counts are not duplicative awards for the same injury, and thus cumulation of the awards was proper." *Id.*

Here, in contrast, the jury instructions on damages were contradictory and confounding. It is true that the jury was told not to duplicate damages:

> You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his [sic] injuries, you must not award him [sic] any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once and may not recover more than he [sic] has lost.

But immediately after this no-duplication instruction, the judge confusingly told the jury:

> Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all his [sic] injuries. You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim.
>
> Although there are multiple defendants in this case, it does not necessarily follow that if one is liable, all or any of the others are also liable. Each defendant is entitled to fair, separate and individual consideration of his or

her case without regard to your decision as to the other defendants.

If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury.

If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant who[m] you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages.

If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable without determining individual percentages of liability.

If you find that plaintiff has proven any of the claims against any of the defendants, you must determine what amount of damages, if any, plaintiff is

> entitled to recover from each defendant, and you will use Verdict Form A.

This bewildering hodgepodge of instructions—some inapplicable, some simply wrong—erased whatever effectiveness the no-duplication instruction might have had. The panel omits any discussion of the instructions as a whole, which like the verdict form had the effect of inviting the jury to assess damages "by defendant" and "by claim." The instructions also appear to have invited the jury to decide the issue of joint liability, which is a legal question for the court. Thus, although the jury was indeed told not to award damages more than once for the same injury, it was also told to award damages for different injuries on separate claims, to award damages separately by defendant, and to decide whether any of the defendants "acted jointly," and if so, to "treat them jointly for purposes of calculating damages." We cannot safely rely on the presumption that jurors follow their instructions when the instructions are this muddled. Here, unlike in *Havoco*, we cannot know with any confidence exactly what the jury did.[2]

This brings me back to *Watts*. That case involved a § 1983 claim against five defendants who specifically asked the district court to instruct

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[2] This is not to suggest that better instructions necessarily would have cured the serious flaws in the verdict form.

the jury to assess damages separately by defendant. The court did so (which was a mistake), and the jury found each defendant liable for damages of $40,000. The plaintiff claimed this meant he could recover $200,000, but we disagreed. The plaintiff had a single indivisible injury for which the defendants were jointly liable, so stacking the separate awards was inappropriate. We gave the plaintiff a choice: He could either accept a judgment in the amount of $40,000 or have a new trial on damages. *Watts*, 774 F.2d at 180-81. *Watts* therefore specifically *rejected* the remedy of aggregation for a verdict that improperly assesses damages "by defendant" in a single-injury joint-liability case.

Although there are some differences between *Watts* and this case, the material similarity is this: The jury was improperly invited to award damages "by defendant" in a single-injury joint-liability case, and the question on appeal was whether the resulting separate damages awards may properly be aggregated. *Watts* answered this question "no"—aggregation is *not* appropriate in this situation. Here, the error is even worse because the jury was invited to award damages "by defendant" *and* "by claim"—and was given unintelligible instructions to boot. Aggregation is no more appropriate here than it was in *Watts*.

In short, there are ample reasons for rehearing en banc. That this case went so badly askew suggests a need for greater clarity on how

damages should be tried.[3] The amended opinion overreads *Bosco*, misapplies *Havoco*, and conflicts with *Watts*. The panel relies too heavily on the presumption that jurors follow their instructions—a presumption that is unwarranted given the circumstances, or at least cannot bear the weight the panel assigns to it. The panel approves the aggregation of improper separate damages awards in a single-injury joint-liability case; this has consequences for the law of damages in our circuit. My concern is not so much with the size of this judgment than with the process by which it was reached, which the panel rightly acknowledges was flawed but wrongly declines to remedy. I would grant Cook County's petition for rehearing en banc.

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[3] A proper verdict form would have asked the liability questions first, sequentially by claim and defendant, and then directed the jury to answer (if necessary) two damages questions: one setting an amount of damages for Thomas's pecuniary loss from Smith's death (the wrongful-death damages) and the other setting an amount of damages for Smith's death (a single award of damages on all the other claims, which were premised on the same injury).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 1, 2009

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 08-2232, 08-2233, 08-2482, 08-2597 & 08-2948

MARLITA THOMAS,

Plaintiff-Appellee,

v.

COOK COUNTY SHERIFF'S DEPARTMENT, ALEX SANCHEZ, JESUS FACUNDO, TERRENCE TOOMEY, AND COOK COUNTY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04 C 3563—**Ruben Castillo**, Judge.

ARGUED DECEMBER 9, 2008 —
DECIDED DECEMBER 1, 2009

Appendix B

WILLIAMS, *Circuit Judge.* Norman Smith, a thirty-two year-old pretrial detainee, arrived at Cook County Jail on April 24, 2004, and died less than a week later from pneumococcal meningitis. His mother, Marlita Thomas, sued Cook County, the Cook County Sheriff, and a number of correctional employees, under 42 U.S.C. § 1983, alleging that the defendants violated her son's constitutional rights by failing to respond to his serious medical needs. At trial, a number of Smith's fellow inmates testified that Smith's condition rapidly deteriorated while prison officials turned a blind eye. The jury agreed with this assessment. It returned a verdict in Thomas's favor and awarded damages in the amount of $4,450,000 against Cook County, the Sheriff, and three individual officers. The district court denied the defendants' motion for judgment as a matter of law and the defendants now appeal. Specifically, they challenge the sufficiency of the evidence supporting each of the jury's liability determinations, the trial court's evidentiary rulings, and the jury's compensatory damages calculation.

We conclude that the jury had sufficient evidence to impose liability against the officers for their deliberate indifference to Smith's medical needs. The same is true for Cook County, as the evidence against it was sufficient for a reasonable jury to conclude that the County had a widespread policy of disregarding detainees' medical requests. We do not find sufficient evidence, however, to hold the Sheriff liable. The causal connection

between the Sheriff's policies and practices and Smith's death is tenuous in light of the jury's finding that individual correctional officers deliberately disregarded Smith's medical needs. Nonetheless, the Sheriff's absence as a liable party does not affect the jury's compensatory damage award. The parties are jointly and severally liable for the entire award, which measures the amount required to compensate the plaintiff for her indivisible harm, and the Sheriff only added an additional source from whom the plaintiff could collect. That the Sheriff is no longer liable does not limit the amount of damages to which the plaintiff is entitled.

Nor is the amount affected by the jury's improper allocation among defendants. Because we presume that jurors follow the instructions given, we must interpret the jury verdict to be consistent whenever possible. As a result, we interpret the jury's allocation in this case as an attempt to split the total damages among the defendants, rather than an effort to issue duplicate awards for the same injury. We also do not find a $4,000,000-plus damage award for constitutional violations that resulted in death to be excessive.

Finally, none of the defendants' evidentiary challenges warrant a reversal. Although we are somewhat troubled that the jury only heard the deposition testimony of a key witness and did not have the opportunity to assess his credibility on the witness stand, the district court's decision to

admit the testimony was not an abuse of discretion. And even if it was, corroborating live testimony from other witnesses, along with the defendants' opportunity to cross-examine during the deposition, render its admission harmless. Therefore, we affirm the district court's order denying the officers and Cook County's motions for judgment as a matter of law and for a new trial. But we reverse its judgment denying the Sheriff's motion, and remand with instructions to enter judgment in the Sheriff's favor.

I. BACKGROUND

The Cook County Department of Corrections ("CCDOC") maintains a procedure for examining inmates' health and a system designed to ensure that inmates receive appropriate medical care while incarcerated. Upon arrival at Cook County Jail, each inmate must undergo a medical examination conducted by medical personnel from Cermak Health Services of Cook County ("Cermak"), which runs the health service for detainees at Cook County Jail. Beyond the initial intake procedure, Cermak provides additional medical services to inmates as needed. Each day, a Cermak medical technician is required to visit the tiers, where the inmates reside, and dispense medication, respond to inmate complaints, and collect medical request forms. The technicians then record, in daily contact sheets, the medications dispensed during their rounds, the medical request forms collected, and any other pertinent information, including reports of inmate

sickness. In addition, Cermak maintains an infirmary, mental health facility, lab, pharmacy, and emergency room staffed by physicians, all onsite and within close proximity to the inmates.

For a number of reasons, this system did not always function as it should. First, the Supervisor for Cermak's medical technicians ("CMTs") acknowledged that Cermak had experienced problems with CMTs not picking up medical request forms every day. Some CMTs did not have the keys to access the lockbox where inmates deposited their completed medical request forms. Others simply failed to fill out or turn in their daily contact sheets. Further, a number of correctional officers reported that Cook County Jail was severely under-staffed. The officers, who were employed by the Cook County Sheriff, kept daily logs in which they often made references to the dangers associated with cross-watching—a practice that required one officer to watch two tiers at the same time. One officer noted that cross-watching created a "major security risk." Another complained that he "[could] not be on both tiers at [the] same time." As a result of the under-staffing and cross-watching in Cook County Jail, officers could not perform physical security checks with the frequency required by Sheriff department policy. Also, with fewer officers on duty, CMTs were, at times, unable to gain access to the tiers to complete their rounds.

The plaintiff alleged that her son, Norman Smith, fell through the cracks created by the

systemic problems in CCDOC. Smith's tragic story began on April 23, 2004 when Chicago police officers arrested him for possession of a controlled substance. The next day, he arrived at Cook County Jail, the facility where he was to remain until his trial date. Smith underwent the typical intake routine, which included a chest X-ray, blood pressure screening, psychological screening, and a review of his medical history. Those tests only revealed elevated blood pressure, for which Smith received a week's supply of medication. However, according to Smith's cell mate, Carlos Matias, Smith demonstrated symptoms of illness on the first day he arrived. Matias testified in his deposition that Smith appeared to be dizzy, began vomiting, and asked Matias to initiate a medical request for him.

Other detainees, along with Matias, testified to the rapid deterioration in Smith's condition through the week. For instance, Smith's other cell mate, Tyrrell Mitchell, testified that Smith was vomiting for three to four days before Mitchell was released Thursday, April 29, 2004, and that he wasn't able to hold down any food or maintain conversations with his cell mates. Matias also testified that by Wednesday, April 28, 2009, Smith could no longer walk on his own. Instead, Matias would drag Smith outside of his cell where he remained on the floor. Several inmates claimed to have filled out medical request forms on Smith's behalf. Others testified that they complained directly to correctional officers and medical technicians on duty at the time, and a few even

witnessed or helped Smith fill out his own medical request forms. None of the inmates received a response to these requests.

Early Friday morning, April 30, 2004, Matias awoke to find Smith convulsing on the floor in his cell. He alerted Alex Sanchez, who was the officer on duty at the time, and Sanchez contacted his supervisor, Sergeant James Monczynski. However, the plaintiff contended that significant delays prevented him from receiving immediate care. First, Sergeant Monczynski did not arrive at the cell until about a half hour after Officer Sanchez notified him of Smith's condition. Next, Sergeant Monczynski contacted a Cermak paramedic, who was located in an adjacent building connected by a courtyard, and the plaintiff alleged that it took another half hour for the paramedic to arrive. The plaintiff also claimed that the paramedic spent a half hour in the tier office looking for Smith's I.D. before he called the other Cermak paramedics.

The delays allegedly continued as the paramedics did not have the manpower to lift Smith up the stairs in a gurney. So they waited at the top of the stairs. Fortunately, a few inmates intervened, carried Smith to the gurney, and the paramedics wheeled him out. Smith died later that morning. The Cook County medical examiner determined that he suffered from pneumococcal meningitis, a particularly deadly form of the disease.

Based on these events, Marlita Thomas, Smith's mother, sued a number of individual correctional employees, the Cook County Sheriff, and Cook County under 42 U.S.C. § 1983 for violating Smith's constitutional rights by ignoring his serious medical needs, along with other state law claims. After a two-week trial, the jury returned a verdict against Cook County, the Sheriff, and Officers Facundo, Sanchez, and Toomey for a total of $4,450,000 in compensatory damages. On the verdict forms, the jury allocated $3,000,000 of the damage award against Cook County, $1,000,000 against the Sheriff, $150,000 against the individual defendants collectively for the § 1983 claim, and $300,000 against the individual defendants collectively for the wrongful death and survival claims. The district court ordered a remittitur of the award from $4,450,000 to $4,300,000, but denied the defendants' motions for judgment as a matter of law or for a new trial. The defendants appeal these denials and also challenge the damage award.

II. ANALYSIS

Following the jury verdict, the defendants filed a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), or, in the alternative, for a new trial under Rule 59. In that motion, the defendants argued that the evidence was insufficient to support both individual and municipal liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). We review de

novo the district court's denial of judgment as a matter of law, but we do not weigh evidence or assess the credibility of witnesses. *Walker v. Bd. of Regents of Univ. of Wis. Sys.*, 410 F.3d 387, 393-94 (7th Cir. 2005). Instead, we draw all reasonable inferences in favor of the nonmoving party. *Tart v. Ill. Power Co.*, 366 F.3d 461, 478 (7th Cir. 2004). "Our job is to assure that the jury had a legally sufficient evidentiary basis for its verdict," *Houskins v. Sheahan*, 549 F.3d 480, 493 (7th Cir. 2008) (quoting *Filipovich v. K & R Express Sys., Inc.*, 391 F.3d 859, 863 (7th Cir. 2004)), and the "verdict must stand unless the officers can show that no rational jury could have brought in a verdict against [them]." *Von der Ruhr v. Immtech Intern., Inc.*, 570 F.3d 858, 866 (7th Cir. 2009) (internal quotation marks omitted).

A. Verdict Against Individual Officers

The individual defendants, Officers Facundo, Toomey, and Sanchez, first challenge the jury verdict finding them liable under 42 U.S.C. § 1983 for violating Smith's constitutional rights. The officers argue that the verdict was not supported by evidence or law because the officers' actions represent "inadvertence" at the most. Relying on *Palmer v. Marion County*, 327 F.3d 588, 592 (7th Cir. 2003), the officers claim that the plaintiff must demonstrate both subjective knowledge and intentional disregard of the risk to the inmate's safety. *See also Collins v. Seeman*, 462 F.3d 757, 761 (7th Cir. 2006).

A prison official violates a prisoner's Eighth Amendment rights, and, in this case, due process rights, when he displays deliberate indifference to a serious medical need.[1] *Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008) (citing *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005)). To establish such a violation, the plaintiff must first demonstrate that the condition was objectively serious. *Hayes*, 546 F.3d at 522. An objectively serious medical condition is one that "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Id.* Next, the plaintiff must show that the official "acted with a sufficiently culpable state of mind." *Id.* This inquiry has two components. The official must have subjective knowledge of the risk to the inmate's health and also must disregard that risk. *Collins*, 462 F.3d at 761. The officers do not contest that Smith suffered from a serious medical condition. Instead, they argue that the evidence was insufficient to establish that they both knew

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[1] The inmate in this case was a pretrial detainee. The Eighth Amendment, which prohibits cruel and unusual punishment, only applies to convicted prisoners, but we have held that pretrial detainees are entitled, under the Fourteenth Amendment's due process clause, to the same basic protection. *Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007). As a result, we apply the same legal standard to a claim alleging deliberate indifference to an inmate's medical needs, whether filed under the Eighth or Fourteenth Amendment. *Id.*

of and disregarded the risk of harm.

A brief overview of the record reveals testimony describing in detail Smith's condition on the days leading up to his death. A number of witnesses reported that Smith was vomiting, coughing and exhibiting other signs of serious illness including nausea and lethargy. A fellow inmate reported that on April 29, 2004, the day when all three officer defendants were working, Smith was "coughing a lot, running back and forth to the bathroom, throwing up, just laying on the floor, not moving, not eating . . . ." . Another inmate reported that Smith was lying on the floor in front of the cell—which would have placed him in the direct path of the officials when performing their rounds. Inmates testified that they complained or heard others complain to officers about Smith's condition during all three shifts: 7a.m.-3p.m., 3p.m-11p.m., and 11p.m.-7a.m., that were covered by Officers Facundo, Toomey, and Sanchez respectively. Finally, Officer Toomey testified that he saw Smith that day, and, at one point, saw him lying in front of his cell.

Circumstantial evidence can be used to establish subjective awareness and deliberate indifference, *Hayes*, 546 F.3d at 524, and the examples above are just a few excerpts of testimony that placed a visibly ill Smith within plain view of the officers on duty the day before he died. The evidence suggests that the officers were aware of the risk to Smith's health, either from the inmates' complaints, or from his visible symptoms,

Farmer v. Brennan, 511 U.S. 825, 842 (1970) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."), and their failure to act could have led a jury to find that they ignored this risk.

As we stated earlier, we do not reweigh the evidence nor do we substitute our own credibility determinations, so we cannot accept the officers' invitation to ignore the inmates' testimony. The officers do not explain why the evidence, which clearly supports a finding of subjective knowledge, is legally insufficient. They only argue that it is "conflicting and specious." This is an argument better suited for cross-examination and closing statements than appellate review. When faced with conflicting, or even inconsistent testimony, the jury is free to believe one side over another. *See Taylor v. Bradley*, 448 F.3d 942, 951 (7th Cir. 2006); *Allen v. Chi. Transit Auth.*, 317 F.3d 696, 703 (7th Cir. 2003). And when the plaintiff's witnesses here provided conflicting testimony, the officers had the opportunity to, and did, bring it to the jury's attention. Ultimately, the inconsistencies the officers press seem slightly exaggerated as most of the inmates presented the same basic story: Smith was very ill, the three guards on duty on April 29 knew about it, and they did nothing.[2] As such, we find no error in the

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[2] For example, Smith's cell mate, Tyrrell Mitchell, testified that Smith was vomiting for three to four days before his release and that he was not able to hold down any food or maintain conversations.

district court's decision to deny the officers' motion for judgment as a matter of law.

B. Verdict Against Cook County

At trial, the plaintiff alleged that the following unofficial customs or practices caused the constitutional harm and subsequent death of her son: the failure to have a system in place to allow for prompt review of inmates' medical requests, the practice of severely understaffing correctional officers, and the failure to fix the broken video monitors in Cook County Jail. The jury ruled in the plaintiff's favor and entered a verdict against both Cook County and the Sheriff. Any one of the alleged policies or practices may support a judgment against a governing body. Cook County, however, contends that the verdict cannot stand as a matter of law. It argues that the district court should have directed a verdict in its favor after all of its employees were acquitted, and that it cannot be held liable for the actions of the Sheriff's officers. The Sheriff and the County also dispute whether the evidence supports the grounds upon which the jury found them liable. So the questions we address are whether the plaintiff presented sufficient evidence of a widespread custom or practice, and, if so, whether the County can be held liable.

A local governing body may be liable for monetary damages under § 1983 if the unconstitutional act complained of is caused by: (1) an official policy adopted and promulgated by

its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority. *Monell*, 436 U.S. at 690; *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 674 (7th Cir. 2009). To demonstrate that the County is liable for a harmful custom or practice, the plaintiff must show that County policymakers were "deliberately indifferent as to [the] known or obvious consequences." *Gable v. City of Chi.*, 296 F.3d 531, 537 (7th Cir. 2002). In other words, they must have been aware of the risk created by the custom or practice and must have failed to take appropriate steps to protect the plaintiff. *Id.* Therefore, in situations where rules or regulations are required to remedy a potentially dangerous practice, the County's failure to make a policy is also actionable. *See Sims v. Mulcahy*, 902 F.2d 524, 543 (7th Cir. 1990) (quoting *Jones v. City of Chi.*, 787 F.2d 200, 204-05 (7th Cir. 1986)).

We do not adopt any bright-line rules defining a "widespread custom or practice." As we stated in *Cosby v. Ward*, there is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, "except that it must be more than one instance," 843 F.2d 967, 983 (7th Cir. 1988), or even three, *Gable*, 296 F.3d at 538 ("[T]hree incidents where vehicle owners were erroneously told that their vehicles were not at Lot 6 do not amount to a persistent and widespread practice.") (internal quotation marks omitted). But the plaintiff must demonstrate that there is a policy at issue rather than a random event. This may take

the form of an implicit policy or a gap in expressed policies, *Phelan v. Cook County*, 463 F.3d 773, 790 (7th Cir. 2006) (citing *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005)), or "a series of violations to lay the premise of deliberate indifference." *Palmer*, 327 F.3d at 596 (citation omitted). Beyond these threshold requirements, the jury must make a factual determination: whether the evidence demonstrates that the County had a widespread practice that caused the alleged constitutional harm. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 928 (7th Cir. 2004).

The plaintiff presented evidence to identify the widespread Cook County customs or practices that caused Smith's death. Beginning with the widespread practice of failing to review inmates' timely filed medical requests, the supervisor for Cermak's CMTs, Woodroe Winfrey, testified that medical request forms were not collected every day. The request forms were placed in a locked box, to which, at the time of Smith's death, many CMTs did not have keys. Further testimony suggested that many CMTs had not been told how to obtain keys to the lockboxes, that some CMTs were not turning in their daily encounter forms (which would disclose whether they collected medical request forms), and that Cermak did not have a reporting system for informing supervisors when CMTs failed to make their daily rounds. Jean Kiriazes, Cermak's director of continuous quality improvement and risk management, testified that she was aware the medical request

forms were not collected each day, partly because guards were not available to allow the CMTs on the tier. A number of Cermak employees testified to, and other evidence corroborated, the practice of not retrieving medical requests on a daily basis, including on April 29, 2004, the day before Smith died. We are not dealing with an isolated act of an individual employee, which would be insufficient to establish a widespread custom or practice. *Monell*, 436 U.S. at 691-94. Instead, the jury heard a number of County employees, some of whom were policymakers, testify about a practice that went on for an extended period of time. The dangers of delayed responses to medical requests are readily apparent, and the former director of Cermak seemed to acknowledge as much in his testimony.

The trial testimony also established a link between the failure to check medical requests and Smith's death. Fellow inmate George Robotis testified that on April 28, 2004, he filed a medical request form on Smith's behalf, which he submitted directly to an officer working the tier that morning. On the form, he wrote that because Smith could not move, he was writing on Smith's behalf, and that Smith was not eating, could not get out of bed, was throwing up, and was very ill. Tyrrell Mitchell, who shared a cell with Smith for a short period, testified that he saw Smith fill out a medical request form (although he didn't remember if Smith submitted it to the guard). Alan Robinson, another inmate, testified that he completed a medical request form for Smith "at

least three times," in which he reported that Smith was dizzy, nauseous, vomiting, and that he had seen others submitting written requests for Smith. And the list goes on. Two doctors further testified that pneumococcal meningitis is almost always fatal if not treated, but mortality is no more than 30% if treated. And the plaintiff's expert, Dr. Ben Katz, testified that Smith would have exhibited symptoms of meningitis (vomiting, nausea, fever) by the evening of April 27, 2004. The testimony at trial leads us to conclude that the jury had a sufficient basis to find a widespread practice of CMTs failing to collect medical request forms, and that this failure caused Smith's death.

Furthermore, we find unpersuasive the County's argument that it cannot be held liable under *Monell* because none of its employees were found to have violated Smith's constitutional rights. In support of its argument, the County cites *Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). The Supreme Court in that case determined that a municipality could not be held liable for constitutional violations based on the actions of one of its police officers after the jury found that the individual officer did not inflict any constitutional harm. *Id.* at 799. The Court reached this conclusion, however, under different factual circumstances and for different reasons which do not apply here.

The plaintiff in *Heller* sued the City of Los Angeles and individual members of the police force for damages under § 1983, alleging that the

officers arrested him without probable cause and used excessive force in making the arrest. *Id.* at 797. On the constitutional claims, the jury returned a verdict for the individual officer, and the Supreme Court agreed that the district court properly dismissed the claim against the City. *Id.* at 798-99. The Court noted that the jurors were not instructed on any affirmative defenses that the individual officer may have asserted, nor were they presented with any qualified immunity issues. *Id.* at 798. The absence of these defenses is significant. If, for instance, the officer had pled an affirmative defense such as good faith, then the jury might have found that the plaintiff's constitutional rights were indeed violated, but that the officer could not be held liable. In that case, one can still argue that the City's policies caused the harm, even if the officer was not individually culpable. Without any affirmative defenses, a verdict in favor of the officer necessarily meant that the jury did not believe the officer violated the plaintiff's constitutional rights. And since the City's liability was based on the officer's actions, it too was entitled to a verdict in its favor.

The County, in this case, appears to push for a rule that requires individual officer liability before a municipality can ever be held liable for damages under *Monell*. This is an unreasonable extension of *Heller*. What if the plaintiff here had only sued the County, or didn't know, because of some breakdown in recording shifts, who the CMTs on duty were? The actual rule, as we interpret it, is

much narrower: a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict. *See Heller*, 475 U.S. at 798-99; *see also id.* at 801 (Stevens, J., dissenting). So, to determine whether the County's liability is dependent on its officers, we look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth. *See Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002). The plaintiff in this case alleged that the failure to respond to Smith's medical requests caused his death and violated his right to due process. The jury instructions on the claim listed three elements, each of which the jury had to find by a preponderance of the evidence: "1. Norman Smith had a serious medical need; 2. *[t]he [d]efendant was deliberately indifferent to Norman Smith's serious medical need*; and 3. [t]he [d]efendant's conduct caused harm to Norman Smith." (emphasis added). Based on these instructions, the jury could have found that the CMTs were not *deliberately indifferent* to Smith's medical needs, but simply could not respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms. It is not difficult to reconcile the verdicts in this instance, and we see nothing amiss in holding the County liable even though none of the CMTs were individually responsible.[3]

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[3] The County also makes a somewhat undeveloped argument that it cannot be held liable based on the

C. Insufficient Evidence to Impose Liability Against Sheriff

The Sheriff also challenges whether he can be held liable for damages under *Monell*. The jury

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actions of the Sheriff's officers alone. That may be true because, in Illinois, the Sheriff is an independently elected officer who is accountable only to the people, rather than to the County board. *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (citing Ill. Const. Art. VII, § 4(c)); *see also Franklin v. Zaruba*, 150 F.3d 682, 686 (7th Cir. 1998) ("the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board."); *Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995) ("Illinois sheriffs are independently elected officials not subject to the control of the county."). However, because the jury had sufficient basis to find that the failure to retrieve and act on the detainees' medical requests (which implicates the County's unofficial practice or custom) caused Smith's death, we need not address the additional arguments. Nor must we decide whether the evidence supported the other allegedly harmful policies or practices. The evidence supported the plaintiff's first theory of liability, and we can uphold the jury's verdict on that ground alone. *Cf. Griffin v. United States*, 502 U.S. 46, 60, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) (noting that a jury verdict should not be set aside merely on the chance that it was not supported by sufficient evidence "when there existed other grounds for which the evidence was sufficient").

found the Sheriff liable based on the policy/practice of severely understaffing correctional officers, and the Sheriff believes the evidence is legally insufficient to sustain this verdict. The Sheriff argues that under-staffing cannot be a basis for liability under § 1983, that there is no causal link between under-staffing and Smith's death, and that the Sheriff has limited control of the budget so any fault lies with Cook County.

We begin with what appears to be the Sheriff's strongest argument: the absence of any causal link between its policies and Smith's death. *Monell* recognized that the premise behind a § 1983 action against a government body is "the allegation that official policy is *responsible* for the deprivation of rights." *Monell*, 436 U.S. at 690 (emphasis added). In applying the different theories of liability recognized under *Monell*, we have always required plaintiffs to show that their injuries were caused by the policies or practices complained of. *See Klebanowski v. Sheahan*, 540 F.3d 633, 637 (7th Cir. 2008). This is an explicit requirement of § 1983 and an uncontroversial application of basic tort law. But in cases such as this, where individual defendants are commingled with governmental bodies, and the plaintiff alleges a litany of policy failures that interact to create some constitutional harm, it is sometimes easier to obscure the causal links between different actors.

The individual officers in this case (the Sheriff's deputies) were found liable because they

displayed deliberate indifference to Smith's medical needs, yet the Sheriff was also found liable for its policy of severely understaffing the prison. The only way to reconcile these two verdicts is to find that both the officers' deliberate indifference *and* the policy of under-staffing caused Smith's death. We find the latter unsupported by the evidence presented at trial. A number of inmates testified that they either complained or witnessed others complain to the officers about Smith's condition. At that point, the officers should have taken the steps necessary to investigate and ensure that Smith received medical attention.

The theory that under-staffing may have also caused Smith's death, on the other hand, is too remote to support a verdict against the Sheriff. A governmental body's policies must be the *moving* force behind the constitutional violation before we can impose liability under *Monell*. *Woodward*, 368 F.3d at 927. In § 1983 actions, the Supreme Court has been especially concerned with the broad application of causation principles in a way that would render municipalities vicariously liable for their officers' actions. *Bd. of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."); *see also*

City of Springfield v. Kibbe, 480 U.S. 257, 267-68, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) (O'Connor, J., dissenting). That is why some courts distinguish between the acts that caused the injury and those that were merely contributing factors. *See Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 625 (11th Cir. 2007).

We need not make such a distinction here because the evidence presented at trial does not even establish that under-staffing was a contributing factor. Because the jury held the individual officers liable, it must have found that the officers deliberately ignored Smith's condition. But the evidence does not demonstrate that their actions had anything to do with under-staffing. No one testified or even argued that the officers would have acted differently if more of them were on duty. How many officers would the Sheriff need to hire to ensure that no one deliberately ignores a complaint or medical request? We do not know.

One possible theory that the plaintiff proposes is that the Sheriff's policy of under-staffing prevented the CMTs from retrieving the medical request forms submitted on Smith's behalf. Generally, inmates place their request forms in lockboxes, which are located within the tiers. The officers on duty must first grant the CMTs access into the tiers, after which the CMTs must use their own keys to retrieve the forms from the lockboxes. In other words, when the officers are under-staffed, they may not be available to grant CMTs access to the tiers, and, by extension, the

lockboxes. That is what the plaintiff suggests may have happened here. But the only evidence supporting this conclusion was testimony that CMTs have complained previously of being unable to access the tiers to retrieve the medical requests. Assuming the jury believed the witnesses who claimed to have submitted request forms on Smith's behalf, the plaintiff presented no evidence as to why *those* forms were not retrieved. No one testified that they could not have access to the tiers on the days Smith or the other inmates submitted requests. Some CMTs reported not having keys to the medical request lockboxes, and others did not turn in their daily encounter forms, so there was no way of knowing if they picked up the request forms. The plaintiff even argues (albeit to establish a widespread practice of CMTs failing to retrieve request forms) that one of the CMTs on duty on April 29, 2004, did not have a key to the lockbox and could not have opened it anyways. The relevant question for the causation requirement is whether the Sheriff's policy of under-staffing was the reason the CMTs could not access the forms *on those days* that Smith and the other inmates claimed to have submitted their requests. We see no evidence to suggest that it was.

Nothing occurs in a vacuum, and we have no doubt that additional factors, other than the officers' malfeasance, may be at play. Perhaps if the officers received better training, or if the jail was less crowded, they might not have ignored Smith's condition. All of this may be true, but it

does not satisfy the causation requirement here. To hold otherwise would significantly expand *Monell* and lead us down the road to vicarious liability. So when individual officers are aware of, and make the conscious decision not to respond to, reports of an inmate's poor health, we cannot infer, without more evidence, that under-staffing was the *moving* force behind the resulting injury.

D. Trial Court's Evidentiary Rulings

Cook County, the Sheriff, and the individual officers provide a long list of evidentiary rulings that they claim amounted to an abuse of discretion and warrant a new trial. Among the testimony and other evidence challenged on appeal are: Carlos Matias's deposition testimony, which was read to the jury; a doctor's statements contained in the Sheriff's death investigation report; hearsay statements admitted through Gilbert Yorke, an inmate; and a list of names that the plaintiff obtained of other inmates who had information on Smith's death. We review the district court's decision to admit testimony for an abuse of discretion, and we will only reverse if the district court's evidentiary ruling was not harmless. *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 842 (7th Cir. 2001).

1. Carlos Matias's Deposition Testimony

Federal Rule of Civil Procedure 32 governs the use of deposition testimony during trial. That provision states, in part, that "a party may use for

any purpose the deposition of a witness, whether or not a party, if the court finds: . . . that the party offering the deposition could not procure the witness's attendance by subpoena . . . ." Fed. R. Civ. P. 32(a)(4)(D). Implicit in this rule is an obligation to use reasonable diligence to secure the witness's presence, and the district court has broad discretion to determine whether the proponent has satisfied this requirement. *Griman v. Makousky*, 76 F.3d 151, 154 (7th Cir. 1996). After two subpoenas, a show cause order, numerous phone calls, and a search by a private investigator, the plaintiff could not get Matias, who had since been released from custody, into court to testify. Pursuant to Rule 32, the district court allowed the plaintiff to read Matias's deposition testimony at trial, over the defendants' objections. The defendants argue that the plaintiff did not exercise reasonable diligence in procuring Matias's presence because: (1) the plaintiff was in constant contact with Matias, who was in Chicago, and should have been able to secure his presence; and (2) the district court should have compelled Matias to appear by issuing an arrest warrant but chose not to based on the plaintiff's reassurances that Matias would appear.

Neither Rule 32 nor our case law required the district court to issue an arrest warrant for Matias before admitting his deposition testimony. In *Rascon v. Hardiman*, for instance, we upheld the district court's decision to admit a potential witness's deposition testimony after a private investigator and a process server were unable to

subpoena the witness. 803 F.2d 269, 277 (7th Cir. 1986). Their efforts had satisfied the magistrate judge that the plaintiff exercised reasonable diligence, and we found no abuse of discretion in the judge's determination. *Id.* The defendants, however, attempt to distinguish *Rascon* on the grounds that the plaintiff in this case knew that Matias was in Chicago, and the plaintiff represented that Matias would appear to discourage the district court from issuing an arrest warrant. But knowledge of Matias's whereabouts does not detract from the court's finding that the plaintiff exercised reasonable diligence. Matias's location was never in dispute. In fact, he was subpoenaed twice. The problem was that Matias did not abide by court orders. And the district court found that the plaintiff's attempts to ensure Matias's compliance, including hiring a private investigator to transport Matias to the courthouse, met the reasonable diligence standard. We find no abuse of discretion here.

Reasonable diligence aside, it seems an additional step could have been taken to ensure Matias's presence in court. In most cases, courts understandably elect live or even recorded testimony over transcripts read to the jury. *See, e.g., Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Griman*, 76 F.3d at 153. This preference should be even more pronounced for witnesses, like Matias, who may be instrumental to a party's case. *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 17 (1st Cir. 2000) ("[T]he live testimony of [key] witnesses for the purposes of presenting demeanor

evidence [is] essential to a fair trial.") (citation omitted). The court had anticipated the possibility that Matias would not appear, and advised the parties to review his deposition. Under these circumstances, where everyone has notice that the witness may not comply with court orders, and the plaintiff knows his whereabouts, it would make sense to issue an arrest warrant. Nonetheless, that we may have done things differently in hindsight is beside the point. The court had broad discretion to determine whether the plaintiff's actions satisfied Rule 32's requirements, and we see no reason to reverse its ruling.

And even if we did find error, a number of other *live* witnesses corroborated the more significant or prejudicial statements in Matias's testimony. For example, Matias testified that, on April 24, 2004, Smith's first day in custody, Smith asked him to fill out a medical request form. Robotis said he had filled out a request form for Smith after Matias sent his form in, and Robinson stated that Smith was sick from the first day he arrived at jail. Both Matias and Mitchell also testified that they witnessed Smith fill out a medical request form. By Smith's second day in custody, Matias claimed that he cleaned the vomit Smith left behind in the day room, and Mitchell testified that he too saw Smith vomiting in the day room. Also, Matias said that on April 28, 2004, a number of inmates told officers that "a man was really sick," referring to Smith. Robotis made similar statements when he testified to personally informing the guards working on the 28th that

Smith was ill, and Mitchell recalled witnessing inmates approach medical technicians to request help for Smith. Finally, Matias testified that Smith could not walk and was lying on the floor, but Mitchell corroborated this statement when he described Smith as lethargic and "not moving" on April 29, 2004. The defendants had the opportunity to cross-examine Matias during his deposition, as well as the other inmates whose testimony corroborated Matias's accounts. Under these circumstances, the minimal prejudice to the defendants does not warrant a new trial.

2. Hearsay and Other Objections

The remaining evidentiary challenges can also be quickly resolved. Officer Raher testified that while investigating Smith's death, Dr. Analgate, the physician on duty when Smith was transported to the emergency room, told him (Raher) that he had heard that Smith had been complaining of illness. The problem with this testimony is that it is not very probative at all. *See* Fed. R. Evid. 403. It only shows that Raher spoke to Dr. Analgate, and learned of Matias's complaints, on April 30—the day Smith was taken to the emergency room. His failure to interview more witnesses after the fact says nothing about the County's response to requests for medical attention. Similarly, Dr. Analgate did not indicate when he heard about Smith's complaints (whether before or on the 30th), so his statements do not tell us much about County policy either. Nonetheless, if any error occurred, it does not warrant a new

trial. A number of inmates testified that they submitted medical request forms and complained directly to the officer, and it is unlikely that this testimony had an injurious effect on the verdict.

The other inmates' testimony also renders harmless the admission of Gilbert Yorke's statement and the alleged hearsay statements in Matias's deposition testimony. Yorke testified that Matias told him to sleep on the top bunk because Smith had been sick since he arrived on the tier (Smith and Yorke shared bunk beds), possibly inferring that the guards should have known that Smith was sick and responded. Even if Yorke's testimony could be read to allow this inference, the jury heard ample other testimony that other inmates had put the officer defendants on notice of Smith's condition, and so any error in admitting Yorke's testimony was harmless.

We find the defendants' remaining evidentiary challenges meritless. These include: Matias's deposition statement that he heard a nurse say that Smith was just "dope sick" and that there was nothing she could do about it; the admission of the list given to the plaintiff containing the names of inmates who wanted her to know what happened to her son; the plaintiff's testimony about Smith's past jobs; the admission of Smith's resumé; and the district court's decision to exclude evidence of Smith's previously unknown child. Matias's statement that a nurse told him that Smith was just "dope sick" is not hearsay. Federal Rule of Evidence 801(d)(2)(D) states that "[a] statement is

not hearsay if . . . the statement is offered against a party and is the party's own statement, in either an individual or a representative capacity . . . or a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .". The plaintiff used the statement, made by a Cook County employee, to show that the County employees were deliberately indifferent to Smith's illness and had a widespread practice of ignoring medical requests; therefore, it was admissible.

Regarding the list of inmates, the plaintiff argues that the list was only offered to show how the plaintiff found the inmates who testified at trial. For this purpose, the list is not hearsay, but it is unclear why it was relevant in the first place. Many inmates on the list testified and described in detail Smith's condition in the days leading up to his death. As the district court noted, how the plaintiff found the inmate witnesses is of limited probative value. But for that same reason, its admission was also harmless. We cannot think of any reasonable inference the jury could have made from the list that it could not have made from the inmates' testimony.

We also agree with the district court that the admission of Smith's resumé and testimony about his past employment and education do not warrant a reversal. Rule 901(a) of the Federal Rules of Evidence states that the authentication requirement "is satisfied by evidence sufficient to

support a finding that the matter in question is what its proponent claims." Smith's mother (the plaintiff) and girlfriend testified, based on their personal knowledge, to Smith's past employment and education, which included jobs at McDonald's, Dominicks, Clark gas station, T.E.A.M.S., and Commander Packaging. Any information in his resumé was also presented through their testimony, which the defendants had an opportunity to challenge during trial. Finally, we see no error in the district court's decision to exclude any evidence of Smith's previously unknown fourth child. The County claims that the evidence would have enabled it to challenge the plaintiff's credibility because she had stated that Smith had only three children. The district court determined that evidence of a previously unknown child would not impeach the plaintiff, and the defendants have not demonstrated otherwise. None of these alleged infirmities entitle the defendants to a new trial.

E. The Jury's Verdict

Although the district court instructed the jury against duplicative compensatory damage awards, the verdict form, to which the defendants did not object, provided spaces for the jury to enter damages for both the denial of medical care (against the individual defendants) and policy and practice (against the County) claims, both of which resulted in the same injury. The district court remitted the jury's total damage award from $4,450,000 to $4,300,000, ($300,000 of which were

for the wrongful death and survival claims) but the defendants argue that the verdict is still inconsistent and excessive. We review the district court's decision not to grant a new trial on damages for an abuse of discretion. *Houskins v. Sheahan*, 549 F.3d 480, 496 (7th Cir. 2008).

On the federal claims, the jury entered $150,000 in damages against the officers collectively, $3,000,000 in damages against Cook County, and $1,000,000 against the Sheriff. As a result, it is unclear whether the jury meant to allocate duplicate awards for the same injury, or whether it merely calculated total damages and allocated the amounts separately based on what it perceived to be each party's relative fault. Because we presume that juries follow the court's instructions, we will assume the latter, *Soltys v. Costello*, 520 F.3d 737, 744 (7th Cir. 2008), which is more consistent with the district court's instruction that the jury not award compensatory damages twice for the same injury.

This raises another question, however, because the defendants were jointly and severally liable, and allocating damages between the parties for the indivisible injury alleged in this case was improper. *See Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 821 (7th Cir. 1994). To remedy this error, the district court decided to place a ceiling at the highest assessment of compensatory damages against any of the jointly liable defendants as opposed to totaling all of the allocated amounts. *See Bosco v.*

Serhant, 836 F.2d 271, 281 (7th Cir. 1987). The highest damage award was $3,000,000 assessed against Cook County; however, the district court also added the $1,000,000 award assessed against the Sheriff.

It appears that the district court adopted two approaches in interpreting the compensatory damage awards. It attempted to place a ceiling on the highest assessment of damages, and, at the same time, added the awards allocated to different defendants (the Sheriff and Cook County). As the district court recognized, we have previously suggested that a ceiling at the highest assessment of compensatory damages may be appropriate when a jury improperly allocates the award among defendants who are jointly and severally liable. *Bosco*, 836 F.2d at 281; *Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985). But those cases do not require us to apply that rule in every instance. One can just as easily argue that, instead of a ceiling, the total damage award should be the sum of all damages allocated among the defendants. *See Watts*, 774 F.2d at 180. Ultimately we interpret jury awards to avoid inconsistency, *Majeske v. City of Chi.*, 218 F.3d 816, 823 (7th Cir. 2000), and presume that juries follow the court's instructions. *Soltys*, 520 F.3d at 744. If the jury avoided duplicate compensatory damage awards, as the court ordered, then a ceiling at the highest assessment would not accurately reflect the amount that the jury determined would compensate the plaintiff. Therefore, adding the damage awards would be more consistent with the

presumptions we apply to jury verdicts.

Under either theory, a $4,000,000 award does not add up. If the district court sought out to establish a ceiling based on the highest damage assessment allocated to a defendant, that number is $3,000,000—the damage award entered against Cook County. To add the $1,000,000 award originally entered against the Sheriff defeats the purpose of placing a ceiling. If, on the other hand, the district court decided to add the allocated damages based on the presumption that the jury heeded its instruction not to issue duplicate awards, then there was no reason to exclude the $150,000 award against the officers. The plaintiff, however, does not challenge the $150,000 adjustment so we will not address it. *Cf. Luellen v. City of E. Chi.*, 350 F.3d 604, 612 n.4, 5 (7th Cir. 2003) (noting that arguments not raised on appeal are waived). Other than the reduction, we agree with the district court's decision to award the damages allocated to both Cook County and the Sheriff. The court presumed that the jury followed its instruction not to issue duplicate awards, and it appropriately interpreted the verdict.

Moreover, our conclusion that the evidence was insufficient to hold the Sheriff's office liable under *Monell* does not affect the damages calculation. The defendants were jointly and severally liable for one indivisible injury, and the damage award represents the amount required to compensate the plaintiff for that harm. *See Petersen v. Gibson*, 372 F.3d 862, 864 (7th Cir. 2004); *Maul v.*

Constan, 928 F.2d 784, 787-88 (7th Cir. 1991). That amount remains the same because it is tied to the injury itself. The plaintiff may collect the full amount from any one of the defendants, and the jury's decision to include the Sheriff among those liable merely added another source of collection. *Watts*, 774 F.2d at 180. Removing the Sheriff from this list, therefore, only removes that potential source but does not affect the amount of damages to which the plaintiff is entitled.

The defendants also argue that the award was excessive. In particular, they note the discrepancy between the jury's allocation of damages against the individual and institutional defendants, and also point to damage awards in other cases in an attempt to show that the jury's verdict was unreasonable. "When the district court has remitted a portion of the jury's award and the defendant claims that the remitted award is still excessive," we review the evidence of damages in the light most favorable to the jury verdict and will only reverse if there is no rational connection between the evidence and the damage award. *Deloughery v. City of Chi.*, 422 F.3d 611, 619 (7th Cir. 2005).

Under the federal standard for reviewing compensatory damages we assess whether the award is "monstrously excessive," "whether there is no rational connection between the award and the evidence," and whether the award is comparable to those in similar cases. *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 611 (7th Cir.

2006). As we stated earlier, the jury's allocation of damages does not render the verdict unreasonable. Nor is it excessive in comparison to similar cases. *Estate of Moreland v. Dieter*, for example, involved a § 1983 claim based on the death of a inmate, and, while the officers' conduct in that case was much more egregious, the jury awarded $29,000,000 in compensatory damages. 395 F.3d 747 (7th Cir. 2005). *Cf. DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678 (7th Cir. 1995) (upholding a $4,201,000 damage award for a plaintiff who was injured and lost his left arm while employed with Illinois Central Railroad). The defendants, however, point to various state court cases with lower compensatory damage awards. Aside from the fact that these cases allege different claims, "[a] court should not substitute a jury's damages verdict with its own figure merely because . . . a plaintiff in a similar case was perhaps not able to plead his facts to the jury as well." *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 485 (7th Cir. 2003).

Finally, we find sufficient evidence to support the award. Smith was only thirty-two years old and died of a treatable illness while in custody. Numerous witnesses testified that their attempts to obtain medical care for Smith, or to alert officials about Smith's condition were largely ignored. Smith had three children whom he supported and with whom he had a close relationship. The jury also heard evidence about Smith's employment history through witness testimony and the admission of Smith's resumé.

He had a solid work history that included McDonald's, Dominicks, Clark gas station, T.E.A.M.S., and working for Commander Packaging as a machine operator. Our review of the facts supporting the damage award and the district court's decision to uphold it is deferential. "We are reluctant to substitute our assessment of the evidence in place of the discretion of the district court, exercised in light of what it witnessed at trial," *Deloughery*, 422 F.3d at 620, and we see no reason to do so here.

III. CONCLUSION

For these reasons, we AFFIRM the district court's denial of Cook County and the individual officers' motion for judgment as a matter of law, and we AFFIRM the district court's denial of the defendants' motion for a new trial. We REVERSE, however, the district court's denial of the Sheriff's motion for judgment as a matter of law and REMAND with instructions that the district court enter judgment in the Sheriff's favor.

APPENDIX C — VERDICT FORM A

We, the jury, find as follows:

Plaintiff's Federal Denial Of Medical Care Claim

Plaintiff is awarded $150,000.00 in compensatory damages.

* * *

Place an "x" in the appropriate line for the manner in which you believe a Defendant to be liable to the Plaintiff.

* * *

	Yes	No
As to Donetta Davis		x
As to Jesus Facundo	x	
As to Darryl Houston		x
As to Douglas Johnson		x
As to Alex Sanchez	x	
As to Louis Thiemecke		x
As to Terrence Toomey	x	
As to Peggy Westbrook		x

Appendix C

Plaintiff's Federal Policy and Practice Claim

Plaintiff is awarded Cook County—$3,000,000.00 Sheriff of Cook County—$1,000,000.00 in compensatory damages.

* * *

Place an "x" in the appropriate line for the manner in which you believe a Defendant to be liable to the Plaintiff.

* * *

1. For the failure to have a system in place so that the medical requests of the detainees were reviewed promptly by properly trained medical staff and acted upon in a reasonable manner.

	Yes	No
As to Cook County	x	

2. For the practice of severely under-staffing correctional officers:

	Yes	No
As to the Sheriff of Cook County	x	
As to Cook County	x	

3. For the failure to timely fix broken video monitors in the Cook County Jail:

	Yes	No
As to Cook County	x	

4. For the falsification of Daily Tier Logs:

	Yes	No
As to the Sheriff of Cook County		x

Appendix C

Plaintiff's Wrongful Death Claim

Plaintiff is awarded $150,000.00 in compensatory damages.

* * *

Place an "x" in the appropriate line for each manner in which you believe a Defendant to be liable to the Plaintiff.

* * *

	Yes	No
As to Donetta Davis		x
As to Jesus Facundo	x	
As to Darryl Houston		x
As to Douglas Johnson		x
As to Alex Sanchez	x	
As to Louis Thiemecke		x
As to Terrence Toomey	x	
As to Peggy Westbrook		x

Appendix C

Plaintiff's Survival Claim

Plaintiff is awarded $150,000.00 in compensatory damages.

* * *

Place an "x" in the appropriate line for each manner in which you believe a Defendant to be liable to the Plaintiff.

* * *

	Yes	No
As to Donetta Davis		x
As to Jesus Facundo	x	
As to Darryl Houston		x
As to Douglas Johnson		x
As to Alex Sanchez	x	
As to Louis Thiemecke		x
As to Terrence Toomey	x	
As to Peggy Westbrook		x

Appendix C

Plaintiff's Intentional Infliction of Emotional Distress Claim

Plaintiff is awarded $0.00 in compensatory damages.

* * *

Place an "x" in the appropriate line for each manner in which you believe a Defendant to be liable to the Plaintiff.

* * *

	Yes	No
As to Donetta Davis		x
As to Jesus Facundo		x
As to Darryl Houston		x
As to Douglas Johnson		x
As to Alex Sanchez		x
As to Louis Thiemecke		x
As to Terrence Toomey		x
As to Peggy Westbrook		x

No. 10-180

In the Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

MARLITA THOMAS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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October 27, 2010

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INTRODUCTORY STATEMENT

Petitioner has presented no "compelling reasons" for its Petition for a Writ of *Certiorari*, as discussed in detail below. *See* Sup. Ct. R. 10. In search of a reviewable issue, Petitioner attempts to manufacture a non-existent circuit split based on a purported *per se* rule never remotely articulated or implicated by the Seventh Circuit's Amended Opinion. In order to do so, Petitioner relies upon objections to jury instructions that were not raised below and issues with the formatting of the verdict form identical to that proposed by defendants below. Indeed, the issue relied upon here as the very premise for Petitioner's *per se* rule argument regarding errors in the jury instructions was raised for the first and only time in this matter by the dissent to the Seventh Circuit's Amended Opinion denying rehearing. These jury instructions were in fact proposed by defendants below and the entire argument relied upon by Petitioner has been waived.

Petitioner then makes poorly developed arguments that general non-controversial holdings of other circuits are in conflict with the manufactured *per se* rule. For good measure, Petitioner throws in an almost completely undeveloped argument that its Seventh Amendment right to a fair trial was violated by a verdict form that broke plaintiff's claims down by count, just as the verdict form proposed by defendants did, and that the Seventh Circuit created a split with sister circuits that still recognize a right to a fair trial. (Pet. 21-23; Record 464 at 69-78.)

Apparently in an effort to bolster its erroneous claim that the plaintiff "invited" the jury "to assess damages by defendant," Petitioner attaches a facsimile

verdict form that appears to indicate that the jury was given separate lines to enter damages against the two defendants in the policy and practice claim. (Pet. 22, App. C, 95a.) However, as the scanned actual verdict form demonstrates, there was only one line for damages in this count, as with all the counts in the verdict form. (Resp. App. A.) While the jury did, in that one count, make an allocation of fault between the two defendants, there was nothing in the verdict form or instructions that invited them to do so. In fact, the jury was carefully instructed not to duplicate damages between the various counts, and plaintiff's attorneys in closing argument emphasized to the jury that they could not duplicate damages between the counts. (Tr. 1873-74.)

In reaching its decision, the Seventh Circuit simply followed longstanding case law, with no disagreement with this Court's precedent or any sister circuits, and read the verdict in a manner consistent with the instructions and law. *See, e.g.*, *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 484-85, 53 S.Ct. 252 (1933) ("To regard the verdict as inconsistent on its face is to assume that the jury found for the plaintiff and failed to perform its task of assessing damages... Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way."); *Havoco of America, Ltd. v. Sumitomo Corp. of America*, 971 F.2d 1332, 1343 (7th Cir. 1992) ("our review of jury instructions is limited to the determination of whether the jury was

misled in any way and whether it had an understanding of the issues and its duty to determine those issues."). Now, contrary to longstanding precedent, Petitioner asks this Court to reverse the trial court's and Seventh Circuit's careful attempts to read the verdict in a consistent manner and strive instead to find inconsistency in the verdict. This Court should summarily deny the Petition.

REASONS FOR DENYING THE PETITION

I. Petitioner's Arguments Regarding Errors in the Jury Instructions and Verdict Form Were Not Raised Below and Should Not Be Considered

It is well settled that issues not raised in the courts below should not be considered on review by this Court. *See Rita v. United States*, 551 U.S. 338, 360, 127 S.Ct. 2456 (2007) ("Rita did not make this argument below, and we shall not consider it."); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4, 123 S.Ct. 518 (2002) ("Because this argument was not raised below, it is waived."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S.Ct. 1146 (1981) (a question that "was not raised in the Court of Appeals...is not properly before us").

In an effort to find a "compelling reason" for this Court to take this case, Petitioner latches on to criticisms of certain jury instructions raised *sua sponte* by Judge Sykes in dissent of the denial of the requested *en banc* rehearing. Petitioner's entire initial argument for *certiorari* is premised on now-purported errors in those instructions. (Pet. 12-13.) As Petitioner repeats, Judge Sykes in dissent characterized this set

of instructions as a "bewildering hodgepodge of instructions – some inapplicable, some simply wrong." Picking up on the dissent, Petitioner now argues that this "tidal wave of contradictory instructions" apparently nullified the "no duplication of damages" instruction and resulted in the problematic award of damages by claim. Ironically, however, the instructions now complained about for the first time were in fact the Fifth Circuit pattern instruction number 15.14, proposed by all defendants and plaintiff. (*See* Resp. App. B, defendants' proposed instruction number 39, filed on behalf of all defendants; Record 464 at 64-65.) Petitioner did not object to these "bewildering" instructions at trial. (Tr. 1655-1815.)

At no time during any of the proceedings below – not in the district court, not on appeal, and not in the petition for *en banc* rehearing – did Petitioner or any other party raise an objection to these instructions. (*Id.*) The first time that any critique of these instructions was raised by anyone in this case was Judge Sykes in dissent on the petition for *en banc* hearing. Petitioner never before objected to the cited instructions, but it now asks this Court to grant *certiorari* to review those instructions for error.

Likewise, the dissent heavily relied upon by Petitioner found it problematic that the verdict form was broken down by count. Surprisingly, as was even noted by the dissent, defendants' proposed verdict form "was just as bad" as the actual verdict form used. *Thomas v. Cook County Sheriff's Dept.*, 604 F.3d 293, 315 (7th Cir. 2010) (Sykes, J., dissenting in part from denial of rehearing *en banc*). Like the verdict form that was ultimately used, defendants' proposed form

(filed on behalf of all defendants) also provided for damages to be awarded by count, with the same single line for damages for each count as plaintiff's verdict form. (Record 464 at 69-78.) Because all of Petitioner's claims of error were not raised below, they are waived. "This court sits as a court of review. It is only in exceptional cases coming from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 568 (1927). The questions raised by Petitioner do not present an exceptional case, the issues now raised have been waived, and the petition should be summarily denied.

II. Because the Decision Below Creates No "Compelling Reason" for *Certiorari*, Petitioner Manufactures a Non-Existent *Per Se* Rule to Create Conflict Where There Is None

The court of appeals did not even consider the argument (which was never raised) that the "no duplication of damages" instruction was nullified by the allegedly erroneous instructions which followed, much less set forth a *per se* rule answering that question. The rule that Petitioner asserts was established below—that "a 'no duplication' instruction cures any other error regarding damage instructions in a Section 1983 case"—severely misstates the rationale and holding of the court of appeals in this matter. Indeed, the court of appeals did not even address or consider the issue of the Fifth Circuit pattern instruction proposed by defendants that Petitioner now claims caused a problem with the verdict. No reading of the decision from the court of appeals can

find the rule that Petitioner claims was established and which now forms the basis of the petition.

Far from a *per se* rule, the court below explained that several different approaches may be taken where a jury improperly divides the damages among defendants. The court made clear that which approach is taken is determined by which better reflects the intent of the jury. *Thomas,* 604 F.3d at 311-312. "Which of these approaches should be taken in a specific case will depend on a district court's interpretation of the jury's action in that case, in light of the instructions the jury was given and the verdict form that was used." *Id.* at 312. Indeed, the only rules pronounced by the court in this matter are well established rules consistently followed not only by the Seventh Circuit but by circuits throughout the country: (1) that jury awards are interpreted to avoid inconsistency, and (2) juries are presumed to have followed the court's instructions.

The approach taken in this case, reading the instructions and the verdict forms as a whole, was to presume that the jury followed the no duplication of damages instruction and simply divided the compensatory damages award among the claims, exactly as plaintiff's attorneys suggested in closing arguments. (Tr. 1873-74.) Therefore, the district court took the permissible approach of aggregating the different awards from the various counts. On the policy and practice count, as with the other counts, the verdict form gave a single compensatory damages line, as well as separate lines to indicate liability for the County and the Sheriff. (Resp. App. A.) It should be noted that for all but one of the counts, the jury did not allocate the damages among the defendants. (*Id.*) On

that single compensatory damages line for this claim, however, the jury wrote in two numbers: Cook County – $3,000,000.00, Sheriff of Cook County – $1,000,000.00. (*Id.*) Consistent with the instruction not to duplicate damages, as well as a common sense reading of the verdict form, the trial court and Seventh Circuit found that the jury intended to award $4,000,000.00 on that claim. Therefore, following long-standing precedent that juries are presumed to follow their instructions and that the verdict should be interpreted to avoid inconsistency, the awards were aggregated. In so holding, neither the trial court nor the Seventh Circuit created any kind of *per se* rule as alleged by Petitioner.

III. This Ruling of The Court of Appeals Does Not Create a Conflict For This Court to Resolve

Far from establishing the *per se* rule that a no duplication instruction supplants any other erroneous instructions (an issue never raised and not addressed by the majority below), the court of appeals followed the same rationale as is set forth in all of the other circuit cases which Petitioner now claims are in conflict.

(A) The Seventh Circuit Ruling in This Matter Is Not In Conflict With Any of the Cases Cited by Petitioner

The question argued and ruled upon by the court of appeals in this matter was how to address a jury verdict that allocates damages among jointly and severally liable defendants for a single injury. *Thomas,* 605 F.3d at 311-12. In contrast, none of the

cases cited in the Petition, which are claimed to be in conflict, address this issue, except for *Watts v. Laurent*, 774 F.2d 168 (7th Cir. 1985). *See Carey v. Piphus*, 435 U.S. 247 (1978); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Uphoff Figueroa v. Alejandro*, 597 F.3d 423 (1st Cir. 2010); *Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007); *Fleming v. Harris*, 39 F.3d 905, 907 (8th Cir. 1994); *Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470, 1472 (9th Cir. 1992); *Street v. Parham*, 929 F.2d 537, 539-40 (10th Cir. 1991).

Watts, however, is easily distinguishable from this case. In *Watts*, the jury was instructed that it was to "decide each defendant's case separately as if it were a separate lawsuit." *Watts*, 774 F.2d 168 at 175. In addition, separate verdict forms were tendered for each defendant. *Id.* Unlike in this case, there was no instruction on not duplicating damages. The jury awarded $40,000.00 against each of the defendants. *Id.* The Seventh Circuit reluctantly ordered a remittitur to the $40,000.00 on the basis that the erroneous instructions and verdict forms created a situation where, if the jury was presumed to follow its instructions, the award of $40,000.00 would be the award of total joint and several damages. *Id.* at 180-81. This is far from the situation here, where the verdict form and the instructions properly told the jury not to allocate and not to duplicate damages. Thus, applying the same presumption here as was applied in *Watts* – that the jury followed its instructions – yields the opposite result.

None of the other cited cases even relate to the issue of allocation of damages. Petitioner cites *Carey* for the proposition that, in the absence of proof of

actual injury, a plaintiff may only recover nominal damages. (Pet. 17.) This principle has nothing to do with the issues decided by the Seventh Circuit here. Similarly, Petitioner cites *Stachura* for the proposition that compensatory damages cannot be awarded on the abstract value of a constitutional right. (Pet. 17.) Again, this holding and the Seventh Circuit opinion at issue here pass like ships in the night.

In *Figueroa*, the First Circuit took up the question of purported errors in jury instructions in a case in which the jury found for the defendants and against the plaintiff. *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 427 (1st Cir. 2010). The issue there was the plaintiff's request that the court give a detailed summary of the acts that made up his retaliation claim in the jury instructions. *Id.* at 434. The court rejected that argument finding that "[t]he court's instructions accurately captured the law that plaintiffs must show that working conditions were "unreasonably inferior to the norm for the position." *Id.* Thus, neither the jury nor the court in *Figueroa* addressed the issue pertinent to this case: how to resolve verdict forms where the jury allocates damages between jointly and severally liable parties for a single indivisible injury.

Likewise, the Sixth Circuit in *Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007), did not address any of the pertinent issues relating to allocation of damages. Instead, the issues in that case were challenges to the probable cause and comparative fault instructions. *Id.* at 341-42. The court found that the probable cause instruction was not confusing or incorrect and any error in the comparative fault instruction was harmless because the plaintiffs prevailed on their intentional tort claim. *Id.* at 342. Neither did the

Eighth Circuit in *Fleming*, the Ninth Circuit in *Oviatt*, or the Tenth Circuit in *Street* address the issue of allocation of damages. Each of the cases concerned the propriety of substantive jury instructions, issues that were not part of the Seventh Circuit's decision below. *Fleming*, 39 F.3d at 907 (finding no error in the probable cause instruction that was given at trial); *Oviatt By & Through Waugh*, 954 F.2d at 1481 (finding no error in jury instruction on causation in a policy and practice claim); *Street*, 929 F.2d at 539-40 (finding no error in jury instructions on excessive force and qualified immunity).

None of these cases present any conflict with the Seventh Circuit's ruling in this matter. They all include, and apparently are cited for, the general proposition that the instructions should be considered as a whole when addressing objections to jury instructions. The court below, however, was not addressing objections to jury instructions because no such objections were raised by the County. Further, that proposition was not called into question by the court's ruling below. Indeed, the Seventh Circuit articulated the same rule in reaching its conclusion. *Thomas*, 604 F.3d at 312. Accordingly, this Court should reject Petitioner's transparent attempt to manufacture a conflict in the circuits.

(B) The Approach Taken By This Court And The Circuits To Interpret Jury Verdicts To Find Consistency Does Not Violate The Law Of Damages

Petitioner then appears to claim that because it is jointly and severally liable for damages, the jury's apportionment of damages between two defendants on

one count violates an abstract "law of damages." (Pet. 19-20.) However, for the reasons argued throughout this response, and because defendants were jointly and severally liable, the apportionment as it relates to any "law of damages" is irrelevant. Petitioner remains jointly and severally liable for all damages and therefore its overall responsibility for plaintiff's damages is unchanged. Petitioner cites *Northington v. Marin*, 102 F.3d 1564 (10th Cir. 1996) and *Patrick v. City of Detroit*, 906 F.2d 1108 (6th Cir. 1990) as purported evidence of a circuit split regarding joint and several liability. However, *Northington* merely states that joint and several liability can apply to indivisible injuries in Section 1983 cases. 906 F.2d 1108 at 1568-69. *Northington* does not consider apportionment of damages, jury instructions, or verdict forms and does not apply here. *Patrick* does examine the effect of joint and several liability on a damages award; however, *Patrick* does not involve aggregation or verdict forms. 906 F.2d at 1115-16. *Patrick* held that the trial court's error in refusing to admit certain evidence implicated the rights of all defendants who were jointly and severally liable. *Id.* This issue is not at play in this matter.

As stated throughout this brief, the circuits are not in disagreement about the need to approach a jury's findings with care and respect. Instead of taking Petitioners' approach of desperately hunting for possible flaws in a jury's verdict, this Court and the circuits below infer consistency and understanding where possible. *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 119, 83 S. Ct. 659 (1963) ("[I]t is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to

special interrogatories consistent, they must be resolved that way.'") (quoting *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S. Ct. 780 (1962)). *See also, e.g., Davignon v. Hodgson*, 524 F.3d 91, 109 (1st Cir. 2008) ("When a party claims that jury verdicts are inconsistent, we attempt to reconcile the jury's findings, by exegesis if necessary.") *cert. denied*, 129 S. Ct. 727, 172 L. Ed. 2d 726 (2008) (internal citation omitted).

(C) Contrary to Petitioner's Claims, There is No Circuit Split With Regard to The Seventh Amendment's Guarantee of a Fair Trial

Finally, Petitioner announces that its Seventh Amendment right to a fair trial was violated after the trial court read a Fifth Circuit pattern instruction also proposed by defendants, and used a verdict form that broke damages down by count, just as defendants' proposed verdict form did. (Pet. 21-23; Record 464 at 64, 69-78.) This argument, that the Seventh Circuit's holding has created a circuit split because the Third and Fifth Circuit still require a fair trial under the Seventh Amendment, is both troubling and inadequate. In support of its sweeping claim, Petitioner offers nothing but circular generalities. Petitioner provides the non-controversial and general supposition that Section 1983 claims sound in tort. (Pet. 22.) Petitioner then appears to argue that its right to a fair trial was violated because: (1) fair trial guarantees attach to Section 1983 actions, and (2) it lost after the jury received the instructions that defendants requested. *Id.* Certainly, Petitioner cannot contend that the Seventh Circuit has abolished the right to a fair trial, and in so doing created a

circuit split, yet that is apparently the argument advanced as a compelling reason to grant *certiorari*. (Pet. 22-23.)

Latiolais v. Whitely, 93 F.3d 205 (5th Cir. 1996), *Bailey v. System Innovation, Inc.*, 852 F.2d 93 (3rd Cir. 1998), and *Lemons v. Skidmore*, 985 F.2d 354 (7th Cir. 1993), casually cited by Petitioner, are not in conflict in the court's decision below and do not support Petitioner's claim. In *Latiolais*, the plaintiffs were not allowed to testify or call witnesses at their own jury trial, over the objections of their counsel. 93 F.3d 205 at 207. This is entirely different from Petitioner's claims here. *Bailey* reviewed a mandamus action involving freedom of speech and had nothing to do with jury instructions. 852 F.2d 93. In *Lemons*, which involved the presentation of the plaintiff in leg irons, the Seventh Circuit did not even reach the fair trial issue and remanded on other grounds. 985 F.2d 354, at 357. Petitioner has not cited one case that is on point with regard to the supposed violations of its Seventh Amendment rights. This is because it cannot. The Seventh Circuit has not abandoned the Bill of Rights, and Petitioner's argument is patently frivolous.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition for Writ of *Certiorari*. Therefore, Respondent respectfully requests that the Petition be denied.

RESPECTFULLY SUBMITTED,

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APPENDIX A

VERDICT FORM A

[*Fold-out Exhibit, see next 5 pages*]

VERDICT FORM A

We, the jury, find as follows:

Plaintiff's Federal Denial Of Medical Care Claim

Plaintiff is awarded $ 150,000.00 in compensatory damages. (If you found against Plaintiff on her denial of medical care claim, fill in the number "0".)

Place an "x" in the appropriate line for the manner in which you believe a Defendant to be liable to the Plaintiff. For example, if you believe that a Defendant denied medical care to Norman Smith, then indicate an "x" on the "Yes" line where that Defendant is indicated. If you believe that a particular Defendant is not liable then indicate an "x" on the "No" line where that particular Defendant is indicated.

	Yes	No
As to Donetta Davis		X
As to Jesus Facundo	X	
As to Darryl Houston		X
As to Douglas Johnson		X
As to Alex Sanchez	X	
As to Louis Thiemecke		X
As to Terrence Toomey	X	
As to Peggy Westbrook		X

Plaintiff's Federal Policy and Practice Claim

Plaintiff is awarded $ Cook County-$3,000,000.00 Sheriff of Cook County-$1,000,000.00 in compensatory damages. (If you found against Plaintiff on her policy and practice claim, fill in the number "0".)

Place an "x" in the appropriate line for the manner in which you believe a Defendant to be liable to the Plaintiff. For example, if you believe that a Defendant is liable to plaintiff for a particular policy or practice, then indicate an "x" on the "Yes" line where that Defendant is indicated. If you believe that a particular Defendant is not liable then indicate an "x" on the "No" line where that particular Defendant is indicated.

1. For the failure to have a system in place so that the medical requests of the detainees were reviewed promptly by properly trained medical staff and acted upon in a reasonable manner:

	Yes	No
As to Cook County	X	

2. For the practice of severely under-staffing correctional officers:

	Yes	No
As to the Sheriff of Cook County	X	
As to Cook County	X	

3. For the failure to timely fix broken video monitors in the Cook County Jail:

	Yes	No
As to Cook County	X	

4. For the falsification of Daily Tier Logs:

	Yes	No
As to the Sheriff of Cook County		X

Plaintiff's Wrongful Death Claim

Plaintiff is awarded $ 150,000.00 in compensatory damages. (If you found against Plaintiff on her wrongful death claim, fill in the number "0".)

Place an "x" in the appropriate line for the manner in which you believe a Defendant to be liable to the Plaintiff. For example, if you believe that a Defendant is liable for wrongful death, then indicate an "x" on the "Yes" line where that Defendant is indicated. If you believe that the Defendant is not liable then indicate an "x" on the "No" line where that Defendant is indicated.

	Yes	No
As to Donetta Davis		X
As to Jesus Facundo	X	
As to Darryl Houston		X
As to Douglas Johnson		X
As to Alex Sanchez	X	
As to Louis Thiemecke		X
As to Terrence Toomey	X	
As to Peggy Westbrook		X

Plaintiff's Survival Claim

Plaintiff is awarded $ 150,000.00 in compensatory damages. (If you found against Plaintiff on her survival claim, fill in the number "0".)

Place an "x" in the appropriate line for each manner in which you believe a Defendant to be liable to the Plaintiff. For example, if you believe that a Defendant is liable to plaintiff on the survival claim, then indicate an "x" on the "Yes" line where that Defendant is indicated. If you believe that a Defendant is not liable then indicate an "x" on the "No" line where that particular Defendant is indicated.

	Yes	No
As to Donetta Davis		X
As to Jesus Facundo	X	
As to Darryl Houston		X
As to Douglas Johnson		X
As to Alex Sanchez	X	
As to Louis Thiemecke		X
As to Terrence Toomey	X	
As to Peggy Westbrook		X

Plaintiff's Intentional Infliction of Emotional Distress Claim

Plaintiff is awarded $ 0.00 in compensatory damages. (If you found against Plaintiff on her Intentional Infliction of Emotional Distress Claim, fill in the number "0".)

Place an "x" in the appropriate line for each manner in which you believe a Defendant to be liable to the Plaintiff. For example, if you believe that a Defendant is liable to plaintiff on the intentional infliction of emotional distress claim, then indicate an "x" on the "Yes" line where that Defendant is indicated. If you believe that a Defendant is not liable then indicate an "x" on the "No" line where that particular Defendant is indicated.

	Yes	No
As to Donetta Davis		X
As to Jesus Facundo		X
As to Darryl Houston		X
As to Douglas Johnson		X
As to Alex Sanchez		X
As to Louis Thiemecke		X
As to Terrence Toomey		X
As to Peggy Westbrook		X

1. Sonia Patterson Foreperson
2. Ellie Dents
3. Debby L. Whitworth
4. Mary [illegible]
5. Yagnuti Patel
6. James L. Kaye
7. James C. Rapp
8. Sandra E. Shelley

APPENDIX B

PROPOSED Jury Instructions by Sanchez, Peggy Westbrook, Cook County Sheriff, Officer Davis, Officer Facundo, Officer Houston, Officer Johnson, Officer Theimecke, Officer, Toomey, Cook County (Gallagher, Daniel)

[Filed December 11, 2007]

[Excerpt]

* * *

[p.64]

You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all of his injuries.

With respect to punitive damages, you may make separate awards as to each Individual Defendant on each claim that plaintiff has established. There can be no punitive damages assessed on plaintiff's *Monell* Policy Claims against Cook County and the Cook County Sheriff's Office or plaintiff's state wrongful death and survival claims.

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are multiple Individual Defendants in this case, it does not necessarily follow that if one is liable, all or any of the others also are liable. Each defendant is entitled to fair, separate and individual consideration of his case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages, except for the purposes of punitive damages. If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply

[p.65]

determine the overall amount of damages for which they are liable, without determining individual percentages of liability.

Defendants' Instruction No. 39
Fifth Circuit of Model Jury Instructions-Civil 15.14 as Modified

____ Accepted
____ Rejected
____ Modified

No. 10-180

Supreme Court, U.S.
FILED
NOV 15 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

MARLITA THOMAS, as mother, next friend and Special Administrator of the Estate of Norman L. Smith, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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Chief, Civil Actions Bureau

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ARGUMENT

The "no duplication of damages instruction" given to the jury is, in essence, the foundation of the decision below affirming the jury verdict in this case. *See Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 311 (7th Cir. 2010) (recognizing that the district court instructed the jury against awarding duplicative compensatory damages and presuming that the jury followed that instruction). (Pet. App. 35a.) Relying on this instruction, the majority below affirmed the jury verdict.

Respondent characterizes the decision below as a "careful attempt to read the verdict in a consistent manner." (Res. Br. 3.) Just the opposite is true. Given the verdict form used in this case, the jury's intent is indecipherable and the foundation of the panel decision (*i.e.*, the "no duplication of damages" instruction) could not support the weight placed upon it. As Judge Sykes noted, "[t]he panel relies too heavily on the presumption that jurors follow their instructions — a presumption that is unwarranted given the circumstances, or at least cannot bear the weight the panel assigns to it." *Id.* at 319. (Pet. App. 55a.) Judge Sykes concluded that the court could not "safely rely on the presumption that jurors follow their instructions when the instructions are this muddled. . . we cannot know with any confidence exactly what the jury did." *Id.* at 318. (Pet. App. 53a.)[1]

1. Judge Sykes did note that her views on the bewildering hodgepodge of damage instructions were "not to suggest that better instructions would necessarily have cured the serious flaws in the verdict form." *Id.* (Pet. App. 53a.)

By presuming that the jury followed the "no duplication of damages instruction," the decision below effectively created a rule that the issuance of this instruction cures all other erroneous damage instructions and verdict forms, even those that specifically contradict the "no duplication" instruction. Respondent, however, contends that "[n]o reading of the decision from the court of appeals can find the rule that Petitioner claims was established and which now forms the basis of the petition." (Res. Br. 5, 6.) As both the panel decision and Judge Sykes' dissent recognize, the majority below held that the "no duplication of damages instruction" cured patent errors such as deciding damages prior to liability, assessing damages "by defendant" and "by claim" and aggregating individualized damage awards against multiple defendants for a single injury. *See Thomas*, 604 F.3d at 312. (Pet. App. 39a.) It is impossible to read the decision below and not see that the Seventh Circuit embraced this legal principle.

Of course, the Seventh Circuit did not say that it had adopted a *per se* rule regarding "no duplication of damages" instructions but that is exactly what it did. It does not matter whether the Seventh Circuit formally announced the imposition of a *per se* rule regarding the effect of "no duplication of damages instructions." What matters is that the decision below effectively created such a rule.

Nonetheless, Respondent argues that Petitioner cannot challenge this rule because it has waived any objections to the verdict form and jury instructions that Respondent proposed. (Res. Br 3-5.) This argument has

no factual or legal basis, as the record below shows that Petitioner made multiple objections to Respondent's proposed verdict form and jury instructions.

I. PETITIONER DID NOT WAIVE ANY OBJECTIONS TO RESPONDENT'S PROPOSED VERDICT FORM OR JURY INSTRUCTIONS.

The record below is replete with Petitioner's objections to Respondent's proposed verdict forms and jury instructions on damages. For example, during the parties' conference on jury instructions, the following colloquy between the district court, Andrew Creighton (the Petitioner's attorney), Daniel Gallagher (the attorney for former Sheriff Michael Sheahan and the individual deputy sheriffs) and Daniel Alexander (the attorney for Respondent) took place:

The Court:	I will use the plaintiff's verdict forms.
Mr. Creighton:	Just for the record, I object.
The Court:	Okay.
Mr. Creighton:	I think there's duplication on the damages. They're awarding damages for each of the counts.
Mr. Gallagher:	For each one, Judge.
Mr. Alexander:	There's an instruction on that.

Mr. Creighton: Right, they can only recover once for one injury, and they've got him recovering for *Monell*, they've got him recovering on —

The Court: Where's your instruction that covers duplication of damages? Because if not, we would have to take care of that post-verdict, which you are itemizing each claim, so I'll be able to do that.

(Transcript of Proceedings for December 7, 2007 in *Smith v. Cook County Sheriff's Dep't*, No. 04 C 3563 at 1797-1798, App. 2a-3a.) Petitioner's counsel objected to Respondent's proposed verdict form on the grounds that it provided for the award of damages by claim and for the duplication of damages for a single, indivisible injury in a constitutional tort claim.

Significantly, Respondent's counsel proposed to the district court that a "no duplication of damages instruction" would cure any potential error in her proposed verdict form. (App. 3a.) This approach, which the district court and panel below adopted, is the basis for the *per se* rule regarding "no duplication of damages instructions" that the Seventh Circuit effectively adopted and that Petitioner now challenges.

Respondent proposed a jury instruction — Plaintiff's instruction #38 — to address the issue of a duplicate damage award. (App. 15a-16a.) Judge Sykes

described this instruction as a "bewildering hodgepodge of instructions—some inapplicable, some simply wrong" and found that Plaintiff's instruction #38 "erased whatever effectiveness the no-duplication instruction might have had." *Thomas*, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 53a.) Petitioner filed a written objection to the proposed verdict form stating that this form "presumes that an award is warranted prior to a finding of liability and that liability should be determined after an award." (App. 12a.)[2]

In support of her claim that Petitioner has waived any objection it has to either the verdict form or jury instructions, Respondent contends that: (i) the verdict form that defendants submitted below was just as bad as Respondent's verdict form (Res. Br. 4), (ii) defendants below proposed the equivalent of Plaintiff's instruction #38 (Res. Br. 4) and (iii) to bolster the claim that the jury was invited to assess damages by defendant, Petitioner "attached a facsimile verdict form [to its petition] that appears to indicate that the jury was given separate lines to enter damages against the two defendants in the policy and practice claim (Res. Br. 1-2.) Petitioner will address these three arguments separately.

First, the verdict form that defendants below proposed was different than Respondent's verdict form.

---

2. Both the majority below and Judge Sykes agree with Petitioner that damages should not have been decided prior to liability. *Compare Thomas*, 604 F.3d at 312-313 (Pet. App. 39a) with *Thomas*, 604 F.3d at 319, n. 3 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 55a.)

For example, defendants proposed the submission of special interrogatories asking the jury whether they found the individual defendants to have been deliberately indifferent to the decedent, Norman Smith. The district court declined to submit those interrogatories. Defendants' verdict form also asked the jury to consider liability before turning to damages.

It is true, as Judge Sykes observed, that the verdict form that defendants initially introduced below also had its flaws, particularly with regard to the determination of damages. *Thomas*, 604 F.3d at 315 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 46a.)

But it is also important to note that Petitioner objected to this very problem (*i.e.*, the verdict form would lead to duplicate damages because it asked the jury to determine damages by defendant and by claim) in the jury instruction conference. (App. 2a-3a.) Had the district court sustained the objection to the verdict form that Petitioner made at the jury instruction conference, the remedy would have been to draft a new verdict form that did not invite the jury to duplicate damages. As Judge Sykes concluded:

> [I]t's the judge's responsibility to get the verdict form right, not just pick one side's proposal or the other's. The judge should have rejected both proposals and written a proper verdict form himself or insisted that the lawyers go back to the drawing board. To adopt a seriously flawed verdict form and then tell the jury to disregard its structure is

> a careless way to charge a jury; it invites juror confusion.

Ibid. (Pet. App. 47a.)[3]

Second, Respondents' arguments regarding the damage instructions miss the mark. Appendix B to Respondents' Brief is a proposed instruction that was included in the Cook County Sheriff's proposed instructions. (App. 17a-19a.) The Sheriff's proposed instruction is a red herring for one simple reason: it was Respondent who argued that a "no duplication of damages instruction" would cure any problems with Respondents' proposed verdict form. The district court and the panel below agreed with Respondent. It was Petitioner who steadfastly objected that the verdict form — regardless of any adjoining instruction — would lead to the duplication of damages. (App. 2a-3a, 12a.)

Third, Petitioner did not, as Respondents contend, "attach a facsimile verdict form [to its petition] that appears to indicate that the jury was given separate lines to enter damages against the two defendants." (Pet. App. 95a.) Petitioner simply reproduced the filled out verdict form, including the jury's insertion of "Cook County – $3,000,000.00 Sheriff of Cook County –

---

3. Even if Petitioner did not properly preserve its objection to Respondent's verdict form, the decision of the district court to use this form and the decision below affirming this district court constitute plain error under Federal Rule of Civil Procedure 51(d)(2). Plain error requires a showing that the error "affected the substantial rights of the appellant." *Ammons-Lewis v. Metropolitan Water Reclamation Dist* , 488 F.3d 739, 751 (7th Cir. 2007). The error in the verdict form here deprived Petitioner of its right to a fair trial.

$1,000,000.00" into the blank space for compensatory damages on the form for Plaintiff's federal policy and practice claim. Appendix A of Respondent's Brief contains a copy of the exact same verdict form. The jury, therefore, awarded damages by defendant, even though this portion of the verdict form did not ask them to do so. This only serves to illustrate that the verdict form and jury instructions, when viewed as a whole, directed the jury to award damages by defendant and by claim for a single, indivisible injury.

In sum, the jury duplicated damages and Petitioner objected to the verdict form on this very basis. Petitioner has not waived this objection.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUITS REGARDING THE DAMAGES AVAILABLE IN CONSTITUTIONAL TORT CLAIMS UNDER SECTION 1983 AND THE RULES AGAINST APPORTIONMENT OF DAMAGES AMONG JOINT TORTFEASORS FOR A SINGLE INJURY AND AGAINST AGGREGATION OF DAMAGE AWARDS AGAINST SUCH TORTFEASORS.

A. THE DECISION BELOW DID NOT CONSIDER THE JURY INSTRUCTIONS AS A WHOLE AND THUS CONFLICTS WITH DECISIONS FROM MULTIPLE CIRCUITS.

It is well established that courts view jury instructions as a whole when determining whether the instructions properly set forth the elements of Section

1983. *See Figueroa v. Alejandro*, 597 F.3d 423, 434 (1st Cir. 2010); *Wilson v. Morgan*, 477 F.3d 326, 341 (6th Cir. 2007); *Fleming v. Harris*, 39 F.3d 905, 907 (8th Cir. 1994); *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992); and *Street v. Parham*, 929 F.2d 537, 539 (10th Cir. 1991). Respondent argues that the holdings in these cases are non-controversial and that the decision below does not conflict with them. (Res. Br. 1-2, 8-10.) Judge Sykes, however, recognized the conflict, noting that "the panel omits any discussion of the instructions as **a whole . . .**" *Thomas*, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*) (emphasis added). (Pet. App. 53a.)

The decision below did not discuss the jury instructions as a whole and did not consider the full breadth of the different instructions within Plaintiff's instruction #38 (some of which, as Judge Sykes noted, were wrong and some irrelevant) on the "no duplication of damages" instruction within Plaintiff's instruction #38. *Id.*

In viewing the "no duplication of damages" instruction in isolation from the other jury instructions and the verdict form, the decision below parted ways from the decisions of the First, Sixth, Eighth, Ninth and Tenth Circuits set forth above.

B. THE DECISION BELOW CONFLICTS WITH DECISIONS PROHIBITING THE APPORTIONMENT OF DAMAGE AWARDS AGAINST MULTIPLE DEFENDANTS FOR A SINGLE, INDIVISBLE INJURY AND THE AGGREGATION OF SUCH AWARDS INTO A SINGLE JUDGMENT.

1. Damages For A Single, Indivisible Injury Cannot Be Apportioned Among Joint Tortfeasors.

Respondent argues that the jury was authorized to apportion damages among defendants who, under Respondent's theory of the case, were jointly liable for a single, indivisible injury. (Res. Br. 10-11.) A jury, however, cannot apportion damages among joint tortfeasors for a single indivisible injury. *See Patrick v. City of Detroit*, 906 F.2d 1108, 1114-16 (6th Cir. 1990). That is exactly what the jury did here. Respondent ridiculed this argument as being based on "an abstract `law of damages'." (Res. Br. 10-11.)

The prohibition on apportioning damage awards among joint tortfeasors in a constitutional tort claim for a single, indivisible injury is anything but abstract. *See, e.g., Patrick*, 906 F.2d at 1116 (finding that the verdict form in a Section 1983 case was proper because it did "not make an allowance for apportionment" and "apportionment is improper when only joint and several liability is to be considered"). *See also Bell v. Mickelsen*, 710 F.2d 611, 619 (10th Cir. 1983) (holding that a jury improperly apportioned a $10,000 damage award among two defendants because it is improper to apportion damages for a single injury among defendants who are jointly and severally liable).

Respondent, however, argues that damages were not apportioned here because Petitioner is liable for the entire sum of damages awarded. (Res. Br. 11.) This argument surely begs the question. The jury entered different awards against different defendants. It is, as Judge Sykes found, impossible to know what the jury intended to do. *Thomas*, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 53a.)

In any event, the decision below cannot be reconciled with decisions from the Sixth and Tenth Circuits holding that damages cannot be apportioned among joint tortfeasors for a single, indivisible injury. In *Cleavinger v. Saxner*, 474 U.S. 193, 198 (1985), this Court affirmed a jury verdict which apportioned compensatory damages amongst members of prison disciplinary committee who were held liable for violating prisoners' due process rights but the issue of apportionment was neither raised nor discussed. This case provides an opportunity to address an issue not raised in *Cleavinger* and bring clarity to this point of law.

2. Courts Cannot Aggregate Separate Damage Awards Against Multiple Joint Tortfeasors For A Single, Indivisible Injury Into A Single Judgment.

Prior to the present case, the Seventh Circuit found that a district court may not ask a jury to award damages "by defendant" in a single injury Section 1983 claim and then aggregate the different awards into a single judgment. *See Watts v. Laurent*, 774 F.2d 168 (7th Cir. 1985).

Respondent attempts to distinguish *Watts* on the grounds that the court here gave a "no duplication of damage" instruction. (Res. Br. at 8.) However, that instruction, as Judge Sykes recognized, only exacerbated the problems in the verdict form regarding the determination of damages. Judge Sykes noted that the material similarity between *Watts* and the present case is this:

> The jury was improperly invited to award damages "by defendant" in a single-injury joint-liability case, and the question on appeal was whether the resulting separate damages awards may properly be aggregated. *Watts* answered this question "no" — aggregation is *not* appropriate in this situation. Here, the error is even worse because the jury was invited to award damages "by defendant" *and* "by claim" — and was given unintelligible instructions to boot. Aggregation is no more appropriate here than it was in *Watts*.

Thomas, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 53a-54a.) The decision below cannot be reconciled with *Watts*.

C. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THIS COURT IN *CAREY* AND *STACHURA* REGARDING THE LAW OF DAMAGES IN SECTION 1983 CASES.

Respondent claims that *Carey v. Piphus*, 435 U.S. 247 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) are wholly irrelevant and pass the decision below "like ships in the night." (Res. Br. 9.) Respondent is mistaken.

Respondent admits that under *Carey* and *Stachura*, in the absence of actual proof, a plaintiff in a Section 1983 action cannot obtain compensatory damages. (Res. Br. 9.) The decision below cannot be reconciled with *Carey* and *Stachura*, as the Seventh Circuit affirmed a judgment by aggregating separate damage awards against multiple defendants for a single injury into a single judgment. Because this judgment was not based upon a single determination of damages, Respondent received duplicate damages and thus received compensation beyond what damages were actually proved. Such a result cannot be reconciled with *Carey* and *Stachura*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE RUBEN CASTILLO, AND A JURY DATED DECEMBER 10, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 3563
Chicago, Illinois
December 10, 2007
9:33 a.m.

MARLITA THOMAS, as Mother, Next Friend, and Special Administrator of NORMAN L. SMITH, JR., deceased,

Plaintiff,

-vs-

COOK COUNTY SHERIFF, et al.,

Defendants.

VOLUME 8
TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE RUBEN CASTILLO, AND A JURY

EXCERPTS OF JURY INSTRUCTION CONFERENCE

We then go to your verdict form. It's guilty or not guilty as to the eight defendants, right?

MR. GALLAGHER: Yes, sir.

THE COURT: And then it goes through the different claims --

MR. GALLAGHER: Yes, sir.

THE COURT: -- and awards damages.

MR. GALLAGHER: Yes, sir, which I think is the more appropriate way to do it because if there's no finding of liability, there's no finding of damages.

MR. ALEXANDER: For one thing, guilty implies a criminal burden of proof. They don't need to find them guilty.

MR. GALLAGHER: That's what's on all verdict forms.

MR. ALEXANDER: They need to find them liable.

THE COURT: I will use the plaintiff's verdict forms.

MR. CREIGHTON: Just for the record, I object.

THE COURT: Okay.

MR. CREIGHTON: I think there's duplication on the damages, They're awarding damages for each of the counts.

MR. GALLAGHER: For each one, Judge.

MR. ALEXANDER: There's an instruction on that.

MR. CREIGHTON: Right, they can only recover once for one injury, and they've got him recovering for Monell, they've got him recovering on --

THE COURT: Where's your instruction that covers duplicative damages? Because if not, we would have to take care of that post-verdict, which you are itemizing each claim, so I'll be able to do that.

MR. ALEXANDER: Well, we do -- I thought we had an instruction, your Honor. I thought it was one of the agreed, but I'm looking for it.

THE COURT: Well, you can take a look at that, and I'll look at it. We don't have to resolve it today, but we will resolve it before I instruct the jury. So just make sure we have an instruction.

MR. ALEXANDER: Need no duplication of damages.

THE COURT: Yes, go ahead.

MR. KOWALCZYK: Not waiving our objection to the Monell or any of the other verdict forms of plaintiff's, but I wanted to point out that No. 3, which should be modified to say "as to Cook County" just as your Honor modified that Monell.

MR. GALLAGHER: On one of those.

THE COURT: Okay. Yeah, I think that should be done.

MR. ALEXANDER: I'm sorry, let me get that.

THE COURT: This is on your verdict form as to Monell.

MR. ALEXANDER: Right. I'm looking.

APPENDIX B — DEFENDANTS' JOINT OBJECTIONS TO JURY INSTRUCTIONS, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 04 C 3563

MARLITA THOMAS, as Mother, Next Friend, and Special Administrator of NORMAN L. SMITH, JR., deceased,

Plaintiff,

v.

SHRIEFF OF COOK COUNTY, COOK COUNTY, et al.

Defendants.

Judge Ruben Castillo

DEFENDANTS' JOINT OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

NOW COME Defendants, SHERIFF OF COOK COUNTY, THOMAS DART, OFFICER ALEX SANCHEZ, OFFICER DONETTA DAVIS, OFFICER TERRENCE TOOMEY, OFFICER DOUGLAS JOHNSON, OFFICER LOUIS THIEMECKE,

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OFFICER DARRYL HOUSTON, OFFICER JESUS FACUNDO, PEGGY WESTBOOK and COOK COUNTY, (hereinafter referred to collectively as "the Defendants"), by and through their attorneys, Daniel F. Gallagher, Larry S. Kowalczyk, Dominick L. Lanzito, QUERREY & HARROW, LTD., Assistant State's Attorney Andrew Creighton, Assistant State's Attorney Edward Maloney, and the COOK COUNTY STATE'S ATTORNEY'S OFFICE, and for their objections to Plaintiff's Proposed Jury Instructions, states as follows:

Jury Ins. No. 1 – Leaves out a substantial portion of Circuit pattern instruction 3.1. Leaves out a necessary portion of credibility assessment and the convictions of the witnesses.

Jury Ins. No. 2 – No objection. Although it from the 7th Circuit Pattern Instructions Defendant would submit 5th Circuit Instruction 2.18 in lieu of Plaintiff's Instruction No. 2.

Jury Ins. No. 3 – No objection.

Jury Ins. No. 4 – No objection.

Jury Ins. No. 5 – Would choose to use Jury Instruction 2.16. In addition, that should be supplemented Defendant's 15, which is 5th Circuit model jury instruction 2.17. This instruction discusses the credibility of a witness, including felony convictions.

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Jury Ins. No. 6 – No objection, but would submit Defendant's No. 17.

Jury Ins. No. 7 – No objection. Redundant of Plaintiff's prior instruction No. 5.

Jury Ins. No. 8 – No objection. Redundant to the 5th Circuit model instruction.

Jury Ins. No. 9 – Objection. Defendant, Sheriff of Cook County and Defendant Correctional Officers at no time possessed the CMT Daily Contact Sheet for April 29th; therefore the implication that the Cook County Sheriff's Office and the Cook County Sheriff's Defendant's intentionally destroyed any evidence is a material misrepresentation, and should not be presented to the jury.

Jury Ins. No. 10 – No Objection.

Jury Ins. No. 11 – Objection. Plaintiff's estate also consists of Norman Smith's wife. Under Illinois Law and Wrongful Death Act and the Survival Act she is entitled to take as a part of the estate because she is Norman's wife. Therefore, No. 11 is incomplete and thus, objectionable.

Jury Ins. No. 12 – Objection. Although it is 7th Circuit model, 7.12 as modified plaintiff has deleted No. 4 which states "defendants acted under the color of law which is necessary for a civil rights lawsuit."

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Jury Ins. No. 13 – No objection. Consistent with Defendants Instruction No. 24.

Jury Ins. No. 14 – No objection to the first paragraph. However, Defendant's object to the second portion as it is not part of the 7th Circuit Pattern Instruction. Specifically, Plaintiff inserts actual knowledge of a substantial risk of serious harm can be inferred from the obviousness of the risk, and Defendant's move to strike this based on the pattern instruction. In addition Defendant's would object that there is no proximate cause instruction for Count I.

Jury Ins. No. 15 – Objection. As Paragraph 3 states the Cook County Sheriff had a practice of failing to timely fix broken video monitors in the Cook County Jail. According to this court's ruling on Summary Judgment, this was a policy issue to be addressed specifically by the County of Cook. In addition, No. 2 says the Cook County or Cook County Sheriff of a practice of severely understaffing correctional officers, which is also a misstatement of this court's ruling on Summary Judgment. Therefore, based on those inconsistencies with this court's prior rulings, Defendant's would object to Instruction No. 15.

Jury Ins. No. 16 – Objection. This instruction is not consistent with this court's ruling on Summary Judgment.

Jury Ins. No. 17 – Objection. Paragraph No. 2 is inserted by the plaintiff and is not in accordance with

the Pattern Instruction and we would instruct the court to utilize Defendant's Instruction No. 28.

Jury Ins. No. 19 – No objection based on this Court's rulings on Plaintiff's Motion in Limine.

Jury Ins. No. 20 – No objection. Consistent with Defendants' Jury Ins. No. 35.

Jury Ins. No. 21 – Objection. This instruction should be supplemented with Defendants' Proposed Jury Instruction No. 36, from the 7th Circuit. In addition it fails to mention anything about punitive damages. Plaintiff's Instruction No. 21 also contains language related to individuals that are alive including physical pain and suffering, including physical disability impairment and inconvenience the effect of the plaintiff's injuries and inconvenience of the normal pursuits of pleasure of life, mental anguish and feelings of economic insecurity caused by disability. Loss of income in the past, impairment of earnings and abilities in the future; including a payment of normal progress to plaintiffs due to his physical condition, and post medical expenses. Based on the facts of this case this is an inappropriate instruction.

Jury Ins. No. 22 – Objection. There is no pre-existing condition of meningitis that is noted here or any condition which has been adduced that renders Norman Smith more susceptible to that injury and thus is improper.

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Jury Ins. No. 23 – Objection. Based on the fact that this is a collateral source Jury Instruction and at this point and time there is no evidence of a collateral source paying Norman Smith for anything, thus the instruction is improper.

Jury Ins. No. 24 – Objection.

Jury Ins. No. 25 – Objection.

Jury Ins. No. 26 – Objection. Based on the fact that Plaintiff's Instruction No. 26 in that there is no Respondent superior allegation for Counts IV and V alleged in Plaintiff's Fifth Amended Complaint; therefore the County and the Sheriff's Office cannot be held liable under a theory respondent superior for Counts IV and V.

Jury Ins. No. 27 – Objection.

Jury Ins. No. 29 – No objection other than it should be specific to the Counts to which it applies. In addition there is no proximate cause definition for estate claims.

Jury Ins. No. 30 – Objection. Recommend Defendants' Proposed Instruction No. 37 which follows the language of the Illinois Pattern Instruction No. 31.05. Plaintiff's Instruction doesn't mention the current wife who is entitled to take under the Illinois Intestacy Statutes. In addition it also eliminates what instruction, moral training and other superintendents of education

defendant might have reasonably expected to give to his children had he lived. Therefore, Instruction No. 37 should be used in lieu of Plaintiff's Instruction No. 30.

Jury Ins. No. 31 – Objection. There has been no evidence introduced in this case of loss of society or a relationship between all of the children and Norman Smith.

Jury Ins. No. 31 – No objection. No objection to Pattern Instruction 14.01.

Jury Ins. No. 32 – Objection. There has been no evidence of loss of income or expected future earnings adduced during discovery in this matter.

Jury Ins. No. 33 – Objection. This court has ruled that there has been no evidence of Norman Smith's occupation and Defendants are barred from going into Norman Smith's habits and other activities that are part of his lifestyle. Therefore, the Instruction is improper.

Jury Ins. No. 34 – Objection. Submit Defendants Instruction No. 31 in lieu of the same.

Jury Ins. No. 35 – Objection. Hedonic damages are not recoverable.

Jury Ins. No. 36 – Objection. It's not an Illinois Pattern Instruction or a 7th Circuit Pattern Instruction.

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Jury Ins. No. 37 – Objection. It is not based on Illinois Pattern Instruction 34.01, 30.04.02, 30.05, 30.05.01 or 31.1.

Jury Ins. No. 38 – Objection. Defendants submit their Jury Instruction No. 38 which is based on 7th Circuit Model Jury Instruction No. 7.24. Plaintiff submitted to 15.14. The 5th Circuit Model Jury Instruction more accurately reflected in Defendants Jury Ins. No. 39. In addition, Defendants believe their Instruction No. 40 for mitigation should be also included.

Lastly, plaintiff's Verdict Forms are improper for two reasons: First, it presumes that an award is warranted prior to a finding of liability and that liability should be determined after an award.

Second, it is inappropriately suggestive that an award must be made in this matter regardless of whether there is a finding of liability. Specifically, each verdict form says Plaintiff is awarded $ and then a space for to fill in compensatory damages. Only in parenthesis it says "if you find against the plaintiff on her particular claim fill in the number zero." This instruction is overly presumptive and overly suggesting, therefore these verdict forms should he allowed. Lastly, there should be a signature for each jury member for each particular jury verdict form.

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Respectfully submitted,

SHERIFF OF COOK COUNTY, et al. - Defendants.

By: /s/
Daniel F. Gallagher
One of their attorneys

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APPENDIX C — PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

A LAW OFFICE OF CHRISTOPHER R. SMITH

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Re: 1:04-cv-03563 Smith v. Cook Co Sheriff, et al

Dear Counsel:

Attached please find plaintiff's proposed voir dire and jury instructions. We are sorry that you could not call us back to schedule an instruction conference. We will be working all weekend if you care to meet and discuss jury instructions or any trial issues

Very Truly Yours,

Chris Smith

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 04 C 3563

MARLITA THOMAS, et. al,

Plaintiffs,

v.

SHERIFF OF COOK COUNTY, et. al.,

Defendants.

Judge Castillo

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

* * *

You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all of his injuries.

Appendix C

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are multiple Defendants in this case, it does not necessarily follow that if one is liable, all or any of the others also are liable. Each defendant is entitled to fair, separate and individual consideration of his case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages. If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable , without determining individual percentages of liability.

* * * *

Plaintiff's Instruction No. 38

APPENDIX D — COOK COUNTY SHERIFF'S PROPOSED JURY INSTRUCTIONS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 04 C 3563

MARLITA THOMAS, et al.,

Plaintiffs,

v.

SHERIFF OF COOK COUNTY, et al.,

Defendants.

Judge Castillo

COOK COUNTY SHERIFF'S PROPOSED JURY INSTRUCTIONS

You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all of his injuries.

Appendix D

With respect to punitive damages, you may make separate awards as to each Individual Defendant on each claim that plaintiff has established. There can be no punitive damages assessed on plaintiff's *Monell* Policy Claims against Cook County and the Cook County Sheriff's Office or plaintiff's state wrongful death and survival claims.

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are multiple Individual Defendants in this case, it does not necessarily follow that if one is liable, all or any of the others also are liable. Each defendant is entitled to fair, separate and individual consideration of his case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages, except for the purposes of punitive damages. If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without determining individual percentages of liability.

Appendix D

Defendants' Instruction No. 39

Fifth Circuit of Model Jury Instructions-Civil 15.14 as Modified

___Accepted
___Rejected
___Modified